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The Compatibility of Motor Vehicle Insurance Law between the UK and EU

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Doctor of Philosophy

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Abstract

This thesis examines the EU and UK regulation in respect of motor insurance law, including the Motor Vehicle Insurance Directives (MVID), the Road Traffic Acts 1930 and 1988, the Uninsured Drivers' Agreements and the Untraced Drivers' Agreements. It provides a critical assessment of the compatibility of national laws with their EU source/parent laws – in both the substantive elements of the laws and the administrative and procedural rules under which they operate, and, given the significance of the UK's withdrawal from the EU, the impact of Brexit is considered.

The study will ably demonstrate the deficiencies in the UK's transposition of the law and will argue, given the supporting case law and the underlying rationale for the development of the Directives – the free movement principles of people and goods, that an rationale can be presented that the offending aspects of the national law should be disapplied. It is this aspect of the work which is unique and offers a consistent and certain future for motor vehicle insurance law and the rights of third-party victims in the UK.

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Chapter One: Introduction

1. Introduction

In this thesis the author will consider one of the most important debates concerning insurance law and the laws of the UK and their compatibility with EU parent laws. In the UK, the protection for victims of road traffic accidents dates back to 1930,[1] and was achieved by statutory and extra-statutory provisions where third-party cover became legally compulsory and insurers could not rely on contractual terms to restrict their liabilities towards such victims.[2] The cover was deemed as if the victim was party to the contract and fully insured regardless of the legal position of the policyholder. However, such cover was limited due to certain exclusion clauses that insurers were capable of using to avoid liability. The extra statutory element of the compensatory schemes, which are concluded later between the Motor Insurers Bureau (MIB) and the Secretary of State for Transport were the Untraced Drivers' Agreement (UtDA) and the Uninsured Drivers' Agreement (UDA). Their entry into the national legal system was to ensure national law was brought into line with its parent EU Directive (the Motor Vehicle Insurance Directive (MVID)). The MIB's Agreements aimed to achieve the requirements within the MVIDs to guarantee that third-party victims cannot be left without fair compensation regardless of the wrongdoer's financial position. This required EU Member States to have in place a mechanism through which victims of negligent drivers have access to fair compensation as if the wrongdoer was insured, which in turn required EU Member States to ensure that funds were always available to satisfy the claims.[3]

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[1] The Road Traffic Act 1930 is the first act to consider protection for third-party victims, who are perfect strangers to the contract. For more details see Chapter Three.

[2] Originally s 36 of the RTA 1930.

[3] Which was met by the UK through the MIB. For more detail, see Chapter Four.

However, and although there is a mechanism of compensation for such victims, the UK's national law breaches its obligations to meet the objectives set out by the MVIDs and in providing legal certainty to all the parties involved. To avoid breaching the MVIDs, to meet the required legitimate expectations and to eliminate any cause of uncertainty to the area of law, and to work in compliance with the MVID, the MIB and Secretary of State's Agreements (the UtDA 2017 and UDA 2015) should be cancelled and new (compliant) Agreements should be considered by the authority as a necessary action to guarantee that innocent third-party victims' rights will not be undermined. In *Commission v Hellenic Republic*[4] for instance, the CJEU pointed out how significant it is for individuals in the EU to know their rights in advance in order to ensure certainty. In this respect, various exclusion clauses as applied to insurers and listed in s 148 of the Road Traffic Act 1988 (RTA88) breach, at least through the interpretation offered in national jurisprudence, the instruction provided by the Court of Justice of the European Union. Thus, at present, national law lacks certainty as to what contractual terms apply and can be used against third-party victims in road traffic accidents and what cannot. However, as the exclusion clauses that do not fall within s 148 are to be determined on a case-by-case approach, it makes the law in this respect uncertain, especially where the UK judicial interpretation varies – even between courts at the same hierarchical level.

Nevertheless, the UK judiciary does not aim to play a significant role in ensuring that national law is consistent with the MVID. In other words, the UK approach has not just caused uncertainty due to a continued breach of the MVID, but also due to the different interpretations applicable in national law (the RTA88 and the MIB Agreements). It is the national courts that are in charge of ensuring compliance with EU law and to examine compatibility even though on a case-by-case basis (see for instance, *Unibet (London) Ltd Unibet (International) Ltd v Justitiekanslern*).[5] More

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[4] Case C-290/94 *Commission v Hellenic Republic* [1996] ECLI:EU:C:1996:265.

[5] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECLI:EU;C:2007:163.

claims against the UK (through the remedy available in State liability) may have positive effects, whilst invoking the Directive's provisions in UK courts (and through direct effect against the MIB which has recently been held to be an emanation of the State)[6] increases awareness of the matter and perhaps provoke practitioners to consider such an action for redress as an option where national law falls short of what is an EU requirement.[7] It might also, over time, help to gradually change national law where the Government (in the guise of the Secretary of State for Transport) and the MIB will find themselves indirectly compelled to apply the missing provisions of MVID, which will leave them with little choice but to take the MVID into account when legislating. What has not been fully considered is the possibility of removing the offending national laws completely through an action to have them disapplied using the principle developed in *Factortame*.[8] This would not only stop the uncertainty and inconsistency in application of national and EU laws, but would also ensure that third-party victims of motor vehicle accidents have the full rights and protection, as afforded under EU law, available. This is increasingly important given the developments to the geographic scope of compulsory motor vehicle insurance.[9]

Ultimately, national and EU motor vehicle insurance laws are in a state of flux. The UK's continued membership of the EU is coming to an end. Recent case law at an EU level has confirmed the correct approach adopted in *Vnuk*[10] relating to the obligation for compulsory insurance to apply to

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6 *MIB v Lewis* [2019] EWCA Civ 909.

7 With, for instance, the publicity surrounding cases such as *Delaney v Pickett* [2011] EWCA Civ 1532; and *Delaney v Secretary of State for Transport* [2015] 3 All ER 329.

8 *Factortame (No 2)* (n 8).

9 First established in Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] EUECJ C-162/13 [2016] RTR 10 and then continued through the jurisprudence of the Court of Justice of the European Union in Case C−514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade, Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agrícola Seguros — Companhia de Seguros de Ramos Reais SA, Jorge Oliveira Pinto* [2018] 4 WLR 75, [2017] WLR(D) 788, ECLI:EU:C:2017:908; and Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana* [2018] ECLI:EU:C:2018:661.

10 Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] EUECJ C-162/13 [2016] RTR 10.

vehicles on private and public land, and nationally the Court of Appeal confirmed the status of the MIB as being part of the State and that Articles 3 and 10 of the MVID have direct effect.[11] The law has led to some advancements yet much is still questioned and uncertain, and the transition period in which the UK will remain within the EU and subject to its rules will call into question the certainty of law which the UK has reluctantly followed (or not as the case may be) and whether there will be an appetite to continue along this progressive path. This is why the research presented here is so timely and important. It also acts as a retrospective. A means of considering the failures of the UK to correctly adopt EU law in this area and the implications this had for victims and the relationship between the UK and the EU.

2. Structure of the Thesis

The substantive elements of the thesis begin with Chapter Two where a literature review is provided and the research method is identified. Whilst the subject of EU motor vehicle insurance law is quite niche and there are a limited number of academics writing in the area, some substantial issues have been raised. Critiques have been offered on the problems with compatibility between national and EU law and particularly in relation to the Uninsured Drivers' Agreement 2009 and the Untraced Drivers' Agreement 2003. What is demonstrated in this chapter is the general lack of academic critical research on the most recent and updated agreements and there has been, at least to date, no discussion regarding the possibility that the offending national laws could be subject to disapplication. Such a move would be groundbreaking and offer third-party victims of motor vehicle insurance accidents genuine access to their rights at an EU level. Chapters Three, Four and Five offer a critical examination of the national laws and how they have been implemented and applied in relation to the MVID. At Chapter Six the thesis provides a substantial review and

[11] *MIB v Lewis* (n 6).

argument regarding the use of *Factortame*[12] and the subsequent case authorities to explore the viability of the disapplying of parts of the national laws (outlined and critiqued in Chapters Three, Four and Five) to prevent further erosion of third-party victims' rights in the UK.

The thesis begins to look to the future in chapters 7 and 8 which provide commentary on the issue of Brexit, the European Union (Withdrawal Agreement) Act 2020 and the direction for regulation of motor vehicle insurance law. Whilst the general election in December 2019 has provided a Conservative government with a strong majority and a will (and some argue a mandate) for the UK to leave the EU, the exact relationship and whether this will result in a hard or soft Brexit has still to be determined. Further, following the fall-out from the *Vnuk*[13] judgment, a review of the law and the possibilities for a seventh MVID was undertaken. As yet, there has been no critical commentary relating to that exercise and the longer-term consequences for the development of motor vehicle insurance law. In chapter 7 a discussion of these matters is presented and the chapter concludes with some anticipated and possible consequences for the law.

It should also be noted that there may appear to be a duplication of points throughout the thesis (the main breaches of the MVID). This is intentional and for two primary reasons. The first is the nature of the laws and administrative procedures concerned. As the MVID affects national laws, this means that it applies to the RTA88 and the UDA and UtDA. Thus, breaches of the MVID in legislative articles and in the content and operation of administrative (and here extra-statutory) measures need to be addressed in each. Given the structure of the thesis and to provide the necessary focus for each substantive element presented in the chapters, some of the MVID elements are discussed (although they are applied to that specific element of national law under discussion).

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[12] *Factortame (No 2)* (n 8).

[13] *Vnuk* (n 11).

Secondly, I assume that some readers will 'dip-in' to the thesis and may be singularly interested in one chapter. To save such a reader the time and effort of being directed to various elements in different chapters the materials are presented in each chapter to ensure a flow to the narrative.

3. Research Gap

The literature review has led to some interesting findings. In this Chapter the author has brought together what has been written by the leading academics in the area so that new areas for research can be detected. This examination has identified areas for discussion that have yet to be explored. In other words, the author determines what has been missed in the literature – which is quite substantial but understandable given the dynamic nature of the subject and its constant development. Relatively, there are few academics writing on this topic, which is both a positive and negative. The positive feature is that the author is confident of not missing any important sources of information. The downside is that there are relatively few academic articles from which to source competing ideas. However, the majority of this thesis is based on a doctrinal examination and in this respect there is no shortage of national and EU cases to justify the topic.

The research gap identified is that there has been no meaningful examination of the 2017 UtDA, the consultation following the *Vnuk*[14] ruling (and the expected rolling-back from the decision by the EU Commission); nor has there been any arguments for the disapplication of national law which has been proven to breach EU laws or any real investigation as to the effects of the Brexit decision since academic writing in 2017.

[14] *Vnuk* (n 11).

4. Research Question

In which ways are the national motor vehicle insurance laws deficient in relation to their EU parent laws and is it possible to construct a legally viable argument for the disapplication of these offending laws by adopting a doctrinal examination?

5. Conclusion

This opening chapter has outlined the scope of the thesis and the main aims which it intends to serve. The area of motor vehicle insurance law is vast, covering civil responsibilities, statute, administrative processes, relations between the State and the EU, between the State and a private company, and the relationship through each of these with individuals as policyholders, stakeholders, victims and interested parties. A selective examination has had to be undertaken, but one which identifies the main problem areas, an identification of where deficiencies exist, and it offers a solution to protect the legal integrity of the rule of law whilst giving access to the fundamental EU principles upon which the UK joined the Union and which it must respect and give effect to.

Chapter Two: Methodology and Literature Review

2.1. Introduction

The main focus of the chapter is on reviewing relevant literature on the rights and access to justice for third-party victims of road accidents. Various sources of information are utilised including legislative documents, articles, committee reports, independent reviews, expert opinions, textbooks, treatises, dictionaries, commentaries on statute and any other useful resources. The majority of the methods that will be used in this study are primary sources, supported by quantitative data to demonstrate the impact and effects on access to protective rights in motor vehicle insurance law. As the secondary literature in this respect of the study will form a substantial resource, the author intends to maintain contact with experts to gain information from practice and use this to illustrate the consequence and implications of the interpretation of the rules. In order to achieve a better understanding, a doctrinal research methodology is adopted and relevant publications relating to EU Member States are considered to assist in providing a comparative dimension. Therefore, documents and analysis will not only focus on the UK's statutory and extra-statutory instruments but also on relating topics in EU Member States.

2.2. Research Methodology

> *The key to success in researching legal issues is realizing that research is a process. You cannot memorize a million cases, and you are not looking for a needle in a haystack. But*

you can master the overall process of research. Once you have mastered that process, you can complete almost any research assignment with confidence.[15]

Research has been defined as *'A careful investigation or inquiry specifically through search for new facts in any branch of knowledge.'*[16] Others claim *'Research is basically a systematic, thorough and rigorous process of investigation that increases knowledge.'*[17] In simple words, and according to these definitions, the word research means a search for knowledge by employing a defined research technique and this can apply to any field of study. On the other side and according to Goldblatt,[18] methodology has been defined as *'The study of the general approach to inquiry in a given field*.' According to this definition, one can understand that methodology deals with the strategy of the research as a whole, which differs it from methods, as methods deal with what sort of techniques that researcher utilises in conducting their research. In this study, the method the author adopts is doctrinal study as it is the most appropriate for the examination of laws and their practical application in the courts. Further, legal theory is the methodology used and the focus is legal certainty. It is a fundamental principle and of a great importance for people as they need to know their legal position and be certain of what rights they have in advance.[19] It is also a principle of national and EU law.[20]

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[15] Rowe, S.E. 2009. Legal Research, Legal Writing and Legal Analysis: Putting Law School into Practice. 29 *Stetson Law Review* 1193.

[16] The Advanced Learner's Dictionary of Current English (Oxford, 1952).

[17] Collis, J. and Hussey, R. 'Business Research: A Practical Guide for Undergraduate and Postgraduate Students' 2nd ed. (Palgrave MacMillan: Basingstoke England, 2003).

[18] Goldblatt, D. 'Research Methodology and Writing' (ETH Zurich, 2011).

[19] Tridimas, T. 'The General Principles of EU Law' 2nd ed. (Oxford University Press, 2006).

[20] Legal certainty is enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, 2000/C 364/01.

2.3. Objectives and Research Questions

In broad terms, the aim of any legal research is to find something new, to develop the law and to add something to the exiting knowledge.[21] The purpose of this thesis is to thoroughly study the UK's national law in respect of motor vehicle insurance and its relation to the EU Directives (the Motor Vehicle Insurance Directives - MVID), to find out, to what extent the EU Directives and the UK national law work in consistency to protect third-party victims' rights. The study aims to create an academic analysis of the legislation that governs third-party rights of road accidents. Particularly, the study aims to address the following questions: 1) Does the UK work in compliance with EU Directives in terms of third-party victims of road traffic accidents 2) If not, then, is there any breach of the EU law and where; and 3) what that means to third-party victims of road accidents.

2.4. Limitations

The study will utilise a doctrinal legal research approach to collect data. The approach, however, has been criticised by some schoolers like Hutchinson and Duncan[22] as it merely depends on researchers' analytical skills and their power of reasoning, which may end up with different perceptions of the same legal concept. It may also cause confusion as each researcher relies on his or her own experience and on the availability of legal materials to create his or her own theory, regardless of any social facts (it often ignores factors that lie outside the legal system), which means that a study based on such an approach is theoretical and far away from social reality. Researchers in this regard, focus only on having a convincing logical reasoning to support their theory. Further,

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[21] Atria, F. 'On Law and Legal Reasoning in Methodology of Legal research: Which Kind of Method for What Kind of Discipline' (Hart Publishing Oxford, 2011).

[22] Hutchinson, T. and Duncan, N. 2013). Defining and Describing what we do: Doctrinal Legal Research. 21(3) *Legal Education Digest* 32. Available at: http://www5.austlii.edu.au/au/journals/LegEdDig/2013/41.html.

unreported judgments will not be considered under this approach as it relies only on reported sources such as case law and other traditional sources.[23]

2.5. Doctrinal Research Methodology

There is no a single approach that legal researchers can use to achieve best results, and methods may vary depending on the nature of the problem and how researchers intend to tackle it.[24] However, researchers consider their approach carefully as it is an important step towards achieving better results.[25] Further, as the nature of law is so complex, legal researchers, as Hutchinson and Duncan[26] claim, need to follow a scientific method that involves a systematic search of legal materials, including statutory and judicial pronouncements. Such an approach, according to the authors, will help to achieve a better understanding of the underlying principles and provisions of the researched area of law, where researchers can gain a deep perception of the problem, and therefore reach the best possible conclusions. The doctrinal research approach that the author of this study adopts, allows examination of the wording of legal materials in the Road Traffic Act (RTA) 1930 and 1988 as well as the Motor Insurance Bureau (MIB)'s Agreements alongside the MVID.

Traditionally, such approach is known as a '*black letter methodology*' a *'library-based research methodology*' or '*doctrinal legal research*.' It is however, *'a detailed and highly technical*

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[23] Mills, W. R. 2003. The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research. 46 *New York Law School Law Review*. (2002-2003).

[24] Van Gestel, R. and Micklitz, H-W. 2011. Revitalizing Doctrinal Legal Research in Europe: What About Methodology? (January). EUI Working Paper Law No. 2011/05.

[25] Kothar, I. C. R. 'Research Methodology. Methods and Techniques' (Wishwa Prakashan, New Delhi, 1990).

[26] Hutchinson and Duncan (n 23).

commentary upon, and systematic exposition of, the context of legal doctrine.'[27] Based on this definition a researcher who follows such an approach undertakes a meticulous and systematic interpretation whilst critically analysing and evaluating legal rules. It is essentially research into legal rules and principles[28] and is underpinned by theory (it looks into the law within itself).[29] The approach will be used to gain a clear and comprehensive understating of the researched area of law of this study. It is primarily based on court judgments, statutes and legal provisions. It uses legal sources and it has nothing to do with what sort of impact it may have on peoples' behaviour.[30] In this respect, Hutchinson and Duncan[31] believe that organising the study around legal proposition, principles and judicial pronouncements is what differentiates doctrinal legal research from other approaches, which mainly focuses on statutory provisions and case law analysis.

Motor insurance law and the EU Directives are a black letter law subject, based on rules and regulations and case law.[32] Therefore, this approach is the most suitable approach for this study. According to McConville and Chui, when considering legal research, there are two approaches that usually legal researchers utilise, called the black-letter approach and socio-legal approach.[33] However, the author does not aim to extend the scope of the study to socio-legal research. The study will only focus on examining the wording of relating legal materials, its consistency, soundness and rationality. For example, in Chapter Three, certain legal rules which are related to third-party

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[27] Salter, M. and Mason, J. 'Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research' (Pearson Education, 2007).

[28] Jain, S, N. 1975. Doctrinal and Non-Doctrinal Legal Research. 17 *Journal of the Indian Law Institute*. 4.

[29] Caroline, M., and Murphy, C. Getting a PhD in Law. (Hart Publishing, 2011).

[30] Hutchinson and Duncan (n 23).

[31] ibid.

[32] Atria (n 22), F. 'On Law and Legal Reasoning in Methodology of Legal Research: Which Kind of Method for What Kind of Discipline' (Hart publishing Oxford, 2011).

[33] McConville, M. and Chui, W, H. 'Introduction and Overview in Research Methods for Law' (Edinburgh University Press, 2007), p 1.

victims of road traffic accidents are identified and examined. The examination will be through analysis of the meaning and the underlying principles of these rules, which will then help to highlight any possible inconsistencies and ambiguities within the rules. Further, cases of the CJEU and national courts in regard of third-party victims of road accidents, which are of a great importance, will help to provide information on how both courts (the UK and EU courts) interpret the law. It will provide sufficient information on whether or not inconsistencies exist, as well as on the efficiency of the legal rules in protecting third-party victims' rights. Under doctrinal legal approach, the examination of the relating decisions of these courts will be useful to assess whether or not, there is a system of order and logic in decision making on rules that deal with third-party rights, and how inconsistencies were created.[34]

It is basically a study, which is simply directed to a specific area of law to find and clarify what may obstruct the law from achieving its target, whether ambiguities and inconsistency lie within its rules or not and where possible provide suggestions to overcome any negative consequences of these issues. In order to do so, legal rules need to be systematised and evaluated thoroughly to build up a clear logical and coherent structure, which is according to Kothar,[35] the best way to find a solution to the underlying investigating problem. It, however, requires as a starting point a strong analysis of legal proposition of the law as written body of principles and examine it as it is (by locating the relevant instruments such as judicial opinions, legal treatises, commentaries, textbooks, legal periodicals, debates etc). Thereafter, through critical analysis of these resources one can draw up his initial findings in order to develop them later on to complete the study[36]. In such studies, law library is where researchers can find the required resources for their study, after locating the right

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[34] Jain, S, N. 1975. Doctrinal and Non-Doctrinal Legal Research. 17 *Journal of the Indian Law Institute*. 4.

[35] Kothar, I. C. R. 'Research Methodology. Methods and Techniques' (Wishwa Prakashan, New Delhi, 1990).

[36] Hutchinson. T, C. 2014. Valé Bunny Watson? Law librarians, law libraries, and legal research in the post-internet era. *Law Library Journal*, 106.

resources, then they can move on to systematically analyse the statutory provisions and legal principles and logically structure their study in coherent, consistent and rational ordering. Researcher can therefore, make some new legal propositions.[37]

In this regard, whereas the primary resources for this approach can be case reports and statutory materials (such as legislative Acts, statutory orders, Directives, notifications etc), the secondary resources can be articles and textbooks. The researcher will also take into account other related records and reports of governments as well as parliamentary debates and any related drafts to their area of research, as such resources can be of a great importance to understand the underlying legislative policy of the statute, and it may also help to get deeper understanding of the legal principle or concept of the matter under research.[38] Further, reading about the draft statutes may enhance the chance to discover new dimensions of the researched subject, as it may reveal the difficulties accompanied the process of legislation and what sort of challenge the Act has been through before the final stage, and what other suggestions have been offered and discussed, which may lead to a deeper insight into the problem under research.[39] In this study, the primary instruments, which are legally binding in the UK and regulate the motor vehicle insurance are the RTA 1930 and 1988 and the extra-statutory Agreements between the MIB and the UK government and the EU Directives (MVIDs). As these instruments play the major role in this area of research, they will be the central focus of the study. The study for example, will look deeply into how both national law and EU law were implemented by both court systems so that inconsistencies can be identified.

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[37] ibid.

[38] Barnett, L. 2011. 'The Process of Law Reform: Conditions for Success' *Federal Law Review* 161.

[39] Rowe (n 16).

As mentioned previously, the secondary sources that will be used for this study are academic articles and textbooks. However, the study acknowledges that there are few initiatives around this topic, as the matter of inquiry is relatively new. The research will rely on the resources available in this regard to understand the basic principles of the matter, which may help as well to find new relevant sources. However, textbooks, when looking into statutes and statutory provisions, are not a very useful source as they experience delay in publication and their level of analysis is rather limited.[40] Therefore, in this study, these drawbacks will be taken into account to avoid any negative consequences and to keep up to date with any legislative changes. Further, in doctrinal legal research, legal periodicals can play a great role in this regard. It helps researchers to find out what have been said about an area of law that they are looking into, which may also help to discover different dimension of the topic, be familiar and get a clear and precise picture of what he or she is going to write about and therefore avoid repeating others job by shaping others' ideas in order to find a new area of research. Further, articles that are published under legal periodicals may help to locate new resources.[41] Finally, a researcher may focus on articles more than textbooks (where the author of this study intends to do so) as articles usually provide deeper and better understanding of the topic. However, there are academic texts which will form part of the study. For instance, Merkin and Hemsworth[42] have produced a leading text which offers substantial commentary and assessment on the topic of motor insurance law. Nevertheless, journal articles generally look into a specific aspect of enquiry with greater depth, focusing on critical analysis.[43] Case comments are another legal source for legal researchers, where it is possible to find valuable information from

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[40] Hutchinson, T. C. 'Researching and Writing in Law' 3rd Ed. (Lawbook Co./Thomson Reuters, Sydney, 2010).

[41] Davidson, S. 2010. Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars. 102(4) *Law Librarian Journal* 561.

[42] The author has not come across any book that offers discussion on the issues of third-party victims' right on road traffic accidents apart of one book: Merkin, R. and Hemsworth M. 'The Law of Motor Insurance'(2nd Ed. Sweet & Maxwell, 2016).

[43] Davidson, S. 2010. Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars. 102(4) *Law Librarian Journal* 561.

experts' comments on leading cases, which may help to increase researchers' understanding of the researched area and provide them with extra materials for a better understanding of their topic.[44] In the UK for instance, researchers can use an 'Annual Survey' to find relevant cases, which usually publishes the most important cases of the country. Case reports as well is another useful resource, where judicial decisions are published here in the UK, where researchers can find all recent higher judicial institutions' judicial pronouncements published on England Reports and Weekly law Reports.[45] Therefore, it can be useful tools for the researcher to locate the most relevant judicial decisions as these decisions usually up to date, which may help to overcome the shortage of not being up to date of other resources such as textbooks.

The main and not only databases that the research will utilise are; Westlaw UK and LexisLibrary, where both of which provide case analysis documents, which include a list of places where the case is reported, a summary of the decision, an analysis of subsequent history as well as secondary sources relating to these cases. However, legislative instruments in common law as the case of the UK, are hard to trace as it is scattered in more than one Act. A study of a topic in common law jurisdictions may require a researcher to carry out many different studies of different acts to complete one research. For instance, a researcher needs not only to look into Acts of Parliament but to take into account other legislative instruments such as regulation, form of rules, statutory orders, notifications, directives of administration, case reports and other related judicial decisions and statements.[46] Research, therefore, is inevitable step to effectively enhance the knowledge of any researched area of law.

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[44] Salter, M. and Mason, J. 'Writing law Dissertations: An Introduction and Guide to the Conduct of Legal Research' (Pearson Education, 2007).

[45] Galligan, D. 'Law in Modern Society' (Clarendon Press, Oxford, 2007).

[46] Cohen, M. L. and Olson, K. C. 'Legal Research in a Nutshell' (St. Paul: Thomson/West, 2007).

On one side, one of the most advantageous of doctrinal legal research is that it deals with the problem as a pure legal proposition, which provides answers to the problem under investigation[47] as well as examination as to whether or not the legal propositions are logically coherent.[48] Further, this approach can provide suggestions for improvements if a comparative analysis is used as it helps to derive useful concepts from other identical legal systems and apply it to the system under research.[49]

On the other side, scholars including Posner[50] claim that the law as a field has no a distinct methodology. But he, however, does not deny that law has its own vocabulary, practices and institutions and based on logic, consistency and coherency. Scholars such as Cohen and Olson believe that it is not an easy step for legal researchers, in the age of internationalisation, to employ the right process of locating the relevant materials for their research due to the large number of information and sources available, which becomes a major challenge.[51] Therefore, researchers need to pay special attention towards their processes when locating sources as an inevitable step to achieve sound and profound source usage.[52] Posner further asserted that as there is no a common consent when it comes to legal materials such as passing law and case law, the objectivity in interpretation cannot be assured.[53] In this regard Berring supports Posner' point of view claiming that the rapid changes of modern legal tools becomes a real challenge for researchers. More

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[47] Wilson, G. 'Comparative Legal Scholarship' (Edinburgh University Press, 2007).

[48] Galligan (n 46).

[49] Wilson (n 48).

[50] Posner, R. A. (2001-02). Legal Scholarship Today. 115 *Harvard Law Review*, 1316.

[51] Cohen and Olson (n 47).

[52] Fisher, B., Lange, E. and Scotford, C. 2009. Maturity and Methodology, Starting a Debate about Environmental Law Scholarship. 21(2) *Journal of Environmental Law* 213.

[53] Posner, R.A. 'Law & Literature' 3rd Ed. (Cambridge-London, Harvard University Press, 2009).

publishers and new case law arise very quickly which gives rise to doubt the credibility of regarding certain legal materials to be more relevant than others.[54] Others, however, such as Chynoweth believes that the doctrinal approach cannot be rejected entirely, claiming that elements of this approach analysis can be found in all legal research types.[55] Nevertheless, The study will take all these drawbacks into account to ensure the credibility of its sources, analysis and the conclusion thereby drawn. Nonetheless, in spite of what have been said about doctrinal approach, it remains the most common method used by legal researchers. It is usually directly aimed at finding an answer to a particular legal question/s.[56] It does often overlap with non-doctrinal approaches and requires substantial background reading.[57] In spite of that, scholars such as Bankar and Travers[58] believe that a comprehensive description and explanation of the underlying logic and structure of legal rules can solve any legal problem regardless of other factors such as social, culture, economic, etc.

To summarise, there are four steps that legal researchers usually follow to complete their legal research under a doctrinal approach, which are as follows:[59] First, a researcher needs to identify a legal issue, which usually requires intensive work of background reading so he or she can familiarise him/herself with the undertaking area of study. Secondly, once a researcher manages to identify a legal issue, then he or she needs to allocate the relevant rules of the law of the area of research. Materials may, however, vary depending on whether a researcher is looking into an issue

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[54] Berring, R. 1997. Chaos, Cyberspace and Tradition, Legal Information Transmogrified. 12(1) *Berkeley Technological Law Journal* 189.

[55] Chynoweth, P. 'Legal Research in Advanced Research Methods in the Built Environment' (Blackwell Publishing Ltd, 2008).

[56] Hutchinson and Duncan (n 23).

[57] Bankar, R. and Travers, M. 'Introduction in Theory and Method in Socio-Legal Research' (Oxford, Hart Publishing, 2005).

[58] ibid.

[59] Wren C. G. and Wren J. R. 1990. Reviving Legal Research: A Reply to Berring and Vanden Heuvel. 82(3) *Law Library Journal* 463.

at national or international level. Primary sources are usually adequate for doctrinal legal research. However, secondary sources can be of a great importance if used alongside primary sources.[60] Thirdly, at this point, after a researcher manages to establish the relevant materials to the researched area of law, then he or she has to start critically analysing them in terms of the law. Failing to link the identified issue correctly with the applicable rules may end up with incomplete study. it shall be done in coherent and logical ordering. Fourthly, legal researchers have to come with a conclusion that represent their findings, which is usually based on the established facts and the applicable law.

In conclusion, under a doctrinal legal method, a researcher has to go through many different steps such as critical analysis of legal rules, interpretation, examination and evaluation of what have been said about an area of research before conclusions may be drawn.

2.6. Literature Review

The UK's membership of the EU has resulted in the UK being required to act in accordance with EU legislation due to its superiority. Thus, if there are any the gaps in the UK's implementation of the Directives that would undermine the rights of ordinary people when they seek to claim as a third-party victim[61] and the UK would be in breach. As such, the current state of literature is examined whilst recognising that motor insurance law is a developing, albeit largely under researched, area of law.

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[60] Barnett, L. (2011) 'The Process of Law Reform: Conditions for Success' *Federal Law Review* 161.

[61] Merkin, R. and Hemsworth, M. 'The Law of Motor Insurance' 2nd Ed. (Sweet & Maxwell, 2016).

The UK's Road Traffic Act, which has made compulsory motor insurance a statutory requirement since 1930,[62] latterly had to change as a consequence in order to ensure compliance with the EU legislation. This gave rise to a new Act, the RTA88, and an increasing arrangement between the Secretary of State with a private company (the MIB)[63] - through a series of Agreements,[64] to ensure that the victims of negligent motorists and untraced vehicles could obtain damages as if these drivers were insured. Regarding the MIB and its Agreements, academics including Marson et al (2016)[65] have argued that the Agreements have established clauses and procedural requirements which are believed to be working in the opposite direction to the goals of EU Law (the MVID),[66] leading to uncertainty. They contend that the Agreements have not just failed to work in consistency with the EU Directives but also within its own content. Furthermore, they as well as Bevan[67] believe that the role of the MIB is uncertain in its scope and legal definition. It is, for instance, unclear where and when the MIB shall or shall not be involved in uninsured[68] or untraced[69] drivers' claims. Others such as Merkin and Hemsworth[70] support these points of view believing that the RTA88 and MIB do not follow a logical and comprehensible system in accordance with the MVIDs. Furthermore, in the context of the EU Directives, all of the earlier mentioned authors believe that

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62 See Part II of the Road Traffic Act 1930 (RTA88 s 143).

63 An independent body, which represent clients in making a claim for accidents involving uninsured and untraced drivers, was founded in 1946.

64 Recently, the Untraced Drivers' Agreement 2003 and the Uninsured Drivers' Agreements 1999 and 2015.

65 Marson, J., Ferris, K. and Nicholson, A. 2017. Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' *Journal of Business Law* 1, 51.

66 Collectively known as Motor Vehicle Insurance Directives, which relate to the use of motor vehicles insurance against civil liability and the obligation that can be enforced against such liability. The first directive had to be implemented by 31 December 1973 Article 8.

67 Bevan, N. 2014. A World Turned Upside Down. 2 Journal of Personal Injury Law 136.

68 A driver who caused or contributed to the accident and who, at the time held no valid policy of insurance, but who is identified.

69 A driver deemed responsible for the accident and who leaves the scene without identifying him/herself and cannot be traced.

70 Merkin and Hemsworth (n 62).

the UK's legislators collectively failed to provide the necessary guarantees and adequate compensation to innocent parties who are injured in road traffic accidents. In this regard Bevan[71] asserts that the UK domestic law, in comparison to MVIDs, is defective.[72] Its implementation does not meet the minimum requirement protection for third-party victims required by the EU law. In some cases such as *Delaney v Secretary of State for Transport* (2015),[73] it does not only deprive innocent third-party victims of their full compensation but it completely denies it. Further, Marson et al for instance, believe that the disparity in compliance of the relation between the UK and EU law is significant. They claim that many readers, including lawyers and even the judiciary, will miss (or misunderstand) the contradictory elements and provisions with the EU Directive. On one side, they believe it is completely in line with the EU.[74] On the other one, it is unfortunately below the required level,[75] which will be discussed in more detail in this chapter.[76]

2.6.1. The Purpose of EU Directives

The main purpose of the MVID is to harmonise the law in respect of third-party victims of road traffic accidents, and to ensure that the victims will not be left uncompensated. Thus the ultimate purpose of the MVIDs is to facilitate free movement and have Single Market for EU States can be achieved accordingly.

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[71] Action Not Words, 29 March 2016 posted on Nota Bene: http://nicholasbevan.blogspot.co.uk/2016/03/action-not-words_29.html

[72] See, *Delaney v Pickett* [2011] EWCA Civ 1532, *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267

[73] *Delaney v Secretary of State for Transport* [2015] 3 All ER 329.

[74] See for instance the UK's implementation of Article 9 of the Motor Vehicle Insurance Directive 2009/103/EC).

[75] Third-party motor vehicle insurance.

[76] Marson et al. (n 66).

The MVID[77] states clearly that for Member States to fulfil their duties of guaranteeing third-party victims in any case, they are required to have a compensating body (a national guarantee fund)[78] to deal with cases where a vehicle which caused an accident was not covered by insurance or it's driver was untraced. The Directives however, do not intend to intervene in any Member States' legal system or to alter any rules of other relating liability such as criminal and civil ones. Merkin and Hemsworth claim[79] nonetheless that the Directives can be seen as a mechanism where it works in line with the EU policy to facilitate the free movement of people, services and goods, which in turn requires the movements of vehicles too.[80] However, Marson, and Ferris (2016)[81] believe that the wide margin of discretion of the First Directive for instance, gives EU Member States more room to avoid implementing the Directives according to its legislative objective.[82] For instance, the level of protection, cover and compensation using exclusions and knock-out conditions may leave vulnerable third-party victims without any compensation. Further, the authors argue that insurers and EU private body such as the MIB can claim that the Directive do not require one level of cover but it permits differences among Member States, which may require legislators in the EU to consider the negative consequences of effectiveness of the directives. The authors believe as well that at that point of time, the UK was well ahead in this respect back to 1930 (The Road Traffic Act) and to 1946 (the Uninsured Drivers' Agreement) when the MIB was established where compulsory insurance was required by national provisions to ensure that third-party victims of road accidents

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[77] The First Motor Insurance Directive: 24/04/1972 (72/166/EC);

[78] Article 1(4) where each Member State is required to set up an authorised body for compensation of any personal injury of property damage that was caused by uninsured of untraced drivers. The UK however, since 1946 established the Motor Insurers Bureau (MIB) which was available for uninsured drivers and later in 1969 for drivers untraced.

[79] Merkin and Hemsworth (n 62).

[80] Bevan, N. 2016. Mind the Gap! 129 *The British Insurance Law Association Journal* (BILAJ), 2.

[81] Marson, J. and Ferris, K. 2017. The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority. 38(2) *Statute Law Review*, 133.

[82] See, *Delaney v Pickett* [2011] EWCA Civ 1532, *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267

have their right of compensation guaranteed.[83] However, Bevan (2015)[84] purports that the MIB did not meet its target to protect third-party victims but they (the MIB) used their influential power to illegally deduct or even deprive third-party victims of their rights of compensation as such deduction and deprivation when taking into account the MVID goal become illegal. It is, however, not illegal by itself but, for instance, it becomes illegal as Marson and Ferris (2017)[85] explained that neither the MVID nor the national rules itself provide or is a source of certainty, as national rules conflicting with the spirit of the EU Directive is the main reason of legal uncertainty.

The CJEU,[86] in regard of free movement principles held that "'… *a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued*.'" Therefore, a Member State cannot claim that it is fully in line with the EU unless their national rules, in this respect, do not contradict these objectives. However, Marson and Ferris (2017)[87] believe that as the Directive itself has no direct effect on national laws of Member States but it sets out certain goals to be achieved by these States leaving the implementation of the Directives to be decided the way each Member State believes it suits its legal system. It is therefore, as mention earlier, not the MVID itself which fails to provide certainty, but national rules conflicting with the spirit of the EU Directive is the main reason of legal uncertainty. They continue, believing that if there is an obvious breach of the MVID, then some of the blame can be on the EU legislators themselves as they have failed to find a clear and precise mechanism to assure

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[83] Marson et al. (n 66).

[84] Bevan, N. 2014. Bad Law? 164 *New Law Journal* 7624.

[85] Marson and Ferris (n 82).

[86] It is the highest court in the European Union in matters of European Union law to ensure that EU law is interpreted and applied the same in every EU country. (1952) Luxembourg

[87] Marson and Ferris (n 82).

the way that the Directives can be applied. Merkin and Hemsworth (2016)[88] assert that the EU Commission may defend the EU policy that the freedom of applying the MVIDs was deliberately chosen by the EU to avoid the consequences that Member States may face, as different legal system can use different methods to apply the Directives. Therefore, the focus of the directives is on the legislative aim (certain result to be achieved).

2.6.2. What Undermines the Effectiveness of the Directives

All policies, which were issued on or before fifth of April 2013, are subject to s 152(2) RTA88, which allows insurers in case of a claim, to request through the court that the policy is void for material non-disclosure or misrepresentation, which may deprive third-party victims of their rights.[89] However, Merkin and Hemsworth[90] argue that such avoidance cannot be deemed as a breach of the EU Directives as the Directive itself does not aim to harmonise the provisions of civil law of EU Members. Therefore, insurers can under s 152 RTA88 avoid their liabilities by complying with the requirements of s 151(2)(3) and its exemption. Insurers can avoid compensation legally. Nonetheless, Bevan's[91] real concern is that insurers can misuse risk of exposure by imposing unfair preconditions of a policy cover in order to use them at later stage when a claim arises. In *Delaney v Pickett* [2011][92] for instance, the insurer successfully avoided the insurance policy based on the insured's misrepresentations, and the MIB (which acts as the insurer of last resort) has also declined any responsibility by applying cl 6(1)(e)(ii) and (iii) of the 1999

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[88] Merkin and Hemsworth (n 62).

[89] Bevan (n 81).

[90] Merkin and Hemsworth (n 62).

[91] Bevan (n 81).

[92] *Delaney v Pickett* [2011] EWCA Civ 1532.

Agreement. However, Bevan[93] believes that such avoidance has been restricted to cases occur on or before 5 April 2013 as new cases that arise after this date (6 April 2013) has been made more difficult under the Consumer Insurance Act 2012 for insurers to apply s 152 RTA88 as there is no obligation under this Act on policyholder to disclose all material facts. He nonetheless critiques the definition of s 1 of the Act 2012[94] as it, for example, excludes some policies from protection such as car hire companies and other motor trade dealer's policies. Further, Merkin and Hemsworth[95] consider that insurers can still apply the avoidance where for instance, insurers can provide sufficient evidence that the disclosure involve misrepresentation was reckless or deliberate and the insurer would not have agreed to enter into a contract with the policyholder if such misrepresentation did not take place. Insurers can also pursue court action under s 152 to obtain that the contract would not have been agreed by them, had the truth been known to them. Nonetheless, the authors believe that for the misrepresentation to be considered as a qualified one for avoidance, then the policyholder shall reasonably have known or did not care to know if the misrepresentation was misleading, and whether or not that the matter related to the misrepresentation is important or relevant to the insurer. In such case the insurer can avoid the policy and in some cases retain the premium too. Bevan[96] however, supposes that giving the court the power to declare any policy void where a third-party victim is involved, it can be deemed as a breach of the purpose of the EU Directives.[97] For instance, cl 4(3)(c) of the UDA 2003, which unreasonably limits the rights of victims to report their claims within certain time under the threat of being excluded from any compensation, which requires a victim of an accident to report it within five days in property

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[93] Bevan (n 81).

[94] The definition of s 1 of the Act 2012 only include an individual who enters into the contract wholly or mainly for purposes unrelated to the individuals trade, business or profession.

[95] Merkin and Hemsworth (n 62).

[96] Bevan. N. 2014.'UK in Breach Over Uninsured Drivers'. 164 *New Law Journal* 7610, 4.

[97] Recital 15 of Directive 2005/14.

damages and fourteen days in injury claims regardless of the circumstances of the people involved in the accident whether they are capable at that time the accident to take the right decision to report it or their health condition does not help them to do so. Such a clause cannot be deemed to serve the aim of the EU Directives, as the author claims.

2.6.3. Third-Party Victims' Exclusions

Bevan[98] believes that when considering the CJEU ruling, it is clear that the Court is successively working on removing the discretion from EU Member States not to use any sort of justification to have their own exclusions that do not serve but their narrow agenda, where it is not conferred under the Directive and just aim to prevent third-party victims from their right of compensation, which would threaten the main objective and the effectiveness of the EU Directives (see *Farrell v Whitty*).[99] Nonetheless, in this part of the study, the focus will be on what have been said about the UK's exclusion to third-party victims.

2.6.4. The National Law's Exclusions (The RTA 1988)

Section 151(4) RTA 1988 excludes claimants from compensation in accidents where claimants knowingly let themselves be carried in a stolen or unlawfully taken vehicle. This is however, an exclusion allowed by EU law.[100] Merkin and Hemsworth[101] nonetheless believe that s 151(4)

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[98] Bevan, N. 2015. Tinkering at the Edges. 3 *Journal of Personal Injury Law* 138.

[99] *Farrell v Whitty and Motor Insurers' Bureau of Ireland* [2007] EWHC 1268 (QB).

[100] Bevan (n 81).

[101] Merkin and Hemsworth (n 62).

RTA88, which uses the wording ‘stolen’ or ‘unlawfully taken’ is incompatible and contradicts the EU Directive as the Directive uses only one term ‘stolen’ (see Keith J. in *McMinn v McMinn*.)[102] While the extra term ‘unlawfully taken’ element used in s 151(4) widens the scope of interpretation, it may also deprive third-party victims of their entitlement to compensation where for example, in *Andersen v Mohammed Hameed*, the car was taken by a son without his parent’s consent. The Court of Session held that as the car was ‘unlawfully taken’ it therefore fell within the RTA88 provision s 151(4). In regard of this provision, Bevan[103] believes that both term “construction knowledge’ and’“unlawfully taken’ contradict Article 13 of the EU Directive as well as the conclusion drawn by the House of Lords in *White v White*. The author argues that the term ‘knowledge’ can be misused as to be actual or constructive and not clear where and how to draw the line when interpreting it in order to decide whether the claimant has knowledge or not and therefore apply the exclusion or not. Further referring to ss 143(3) and 151(4) RTA88, the claimant has to have reason to believe.[104] Merkin and Hemsworth[105] however, argue that one may say if s 151 RTA 1988 is not in compliance with the EU law in terms of protecting third-party victims, it is, nevertheless, taking the effect of the Agreements and the MIB alongside with the RTA88 together can be deemed as a compliance with the EU law. However, applying cl 6 of the 1999 Agreement clearly contradict Article 10 of the EU Directive (Sixth Directive) where the clause allows an exclusion that is not permitted by the Directive.[106] In addition, Merkin and Hemsworth[107] believe that s 151(5) RTA88 is also incompatible with the EU Directive as it states 'knew or had reason to believe’ while the Directive is

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[102] *McMinn v McMinn* [2006] EWHC 827 (QB), Times 02-May-2006.

[103] Bevan (n 81).

[104] Bevan (n 99).

[105] Merkin and Hemsworth (n 62).

[106] This refers to the author’s consultation response submitted in reply to the DfT’s February 2013 review of the MIB Agreements. This was published via a link in the author’s 29 March 2016 Nota Bene blog entry, Bevan (n 72).

[107] Merkin and Hemsworth (n 62).

clear: 'knew the vehicle was stolen.' The problem occurs, as the authors claim, where the Directive requires actual knowledge while s 151(5) goes further to interpret that any fact that a passenger is aware of which ought to have led him to come to a conclusion that the vehicle involved in the accident was unlawfully taken and therefore remove the cover, as the cases in *Stych v Dibble*[108] or *McMinn v McMinn*[109] where the victim gave his unlicensed brother (a 17 year old) the car to drive so it was held that the victim ought to have known that the vehicle had been stolen or unlawfully taken.[110]

Furthermore, Merkin and Hemsworth[111] claim that the RTA88 s 151(8) is not in compliance with the the EU Directives too. For instance, *Churchill Insurance Co Ltd v Wilkinson*; and *Evans v Equity Claims Ltd*,[112] deprives a passenger, who suffers injuries as a consequence of an accident, from compensation where he permits an uninsured person to drive his vehicle. The authors argue that one may say that the provision does not deprive the victim from compensation but it gives the insurer the right of recourse. They reply that it, in either way, breaches the EU directives' purpose by not compensating third-party victims.[113] On the other side, Bevan[114] in response to whether the Directive's protective purpose conflicts with s 151(8) RTA88, maintains that the CJEU ruling was clear that the Directives of the EU must be taken into consideration that any national rules that may have an effect on third-party victims' right of compensation cannot be used to exclude victims'

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[108] *Stych v Dibble* [2012] EWHC 1606 (QB).

[109] *McMinn* (n 103).

[110] Merkin and Hemsworth (n 62).

[111] Merkin and Hemsworth (n 62).

[112] *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00.

[113] Merkin and Hemsworth (n 62).

[114] Bevan (n 99).

right of compensation where the accident which caused the injury was by an uninsured driver and the victim who gives a permission to the driver to drive was himself the policyholder and become a victim as a consequence of permitting the uninsured driver to drive his car of the accident. In addition, Merkin and Hemsworth[115] also believe that unless s 145(4)(a) is amended, it breaches Article 12(1) of the MVID 2009,[116] where the Directive does not classify passengers and employees but cover them all equally as well as Article 12(2). The CJEU, in regard of the scope of cover, refused to distinguish between family members and third-party victims but treated them all equally (see *Ferreira v Companhia de Seguros Mundial Conficanca* [2000]).[117]

2.6.5. The Agreements' Exclusion Clauses

Referring to the CJEU ruling in *Ruiz Bernáldez* [1996],[118] the Court stated clearly that Member States of the EU have no discretionary power to pick and choose what rules to apply or to undermine the aim of the EU Directives when it comes to third-party victims' compensation.[119] However, under the 1999 Agreement, a claimant who knowingly let himself be a passenger in a vehicle will be excluded from any compensation where the vehicle; a) was stolen or been unlawfully taken b) was uninsured c) been used in furtherance of a crime or d) to avoid lawful apprehension.

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[115] Merkin and Hemsworth (n 62).

[116] The consolidating Sixth Directive (2009/103 EC).

[117] Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR 1-6711.

[118] Case C-129/94 *Ruiz Bernáldez* [1996] ECLI:EU:C:1996:143.

[119] Bevan, N. 2015. No Through Road. *New Law Journal*, 7648.

Bevan[120] argues that the EU Directives do not allow these exclusions apart of the first criterion (when a claimant knowingly allow himself in a stolen vehicle), which makes the other three exclusion clauses unlawful and therefore they breach EU law. He believes that the breach of EU Law may result in a State liability where the UK government will be ordered to pay the so-called *Francovich*'[121] damages as a State liability for failing to apply the Directives (see also *Delaney v Secretary of State for Transport* (2015).[122] Nonetheless, such action (*Francovich*) as the author believes might not be useful for claimants as it is costly (in time and money) as well as the claimant may encounter litigation risk.[123]

In their book, Merkin and Hemsworth[124] consider that the terms used in the 1999 Agreement'"knew or ought to have known' who let themselves on a vehicle where one of the exclusions above apply to it, does not comply with the EU law as it has no clear meaning and is sufficiently loose to the extent that it can be misused by defendants to undermine victims' right (see for instance, *White v White*). Further, they believe that cl 7 of the 2015 Agreement is no more than a reflection of the 1999 Agreement in a broad sense. The improvement of the new wording in the Agreement of 2015 is 'reason to believe' instead of 'ought to have known' and cannot be considered, according to the authors' opinion, as a compliance with the EU law. Indeed Marson and Ferris (2016)[125] believe that considering these cll 7 & 8 in the light of the Directive and whether the UK really aims to implement the Directives correctly is of real concern: '*Both clause 7 and 8 maintain a phraseology*

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[120] Bevan (n 99).

[121] Member States of the EU could be liable to pay compensation to individuals who suffered loss due to the State's failure to transpose an EU directive into national law.

[122] *Delaney* (n 74).

[123] Bevan, N. 2015. Still Driving Dangerously. *New Law Journal*, 7693.

[124] Merkin and Hemsworth (n 62).

[125] Marson and Ferris (n 82).

used in previous incarnations of the UDA (Clause 6 UDA 1999) regarding the victim's knowledge (or where he had reason to believe) that no (effective) insurance was in place covering the vehicle's use at the time of the accident.' They believe that there is no good faith whatsoever in developing the legal system in this area of law. Besides, the 1999 Agreement has been criticised by Bevan (2016)[126] that the interpretation of 'knowledge' as 'ought to have known' needs to be clear and consistent with ss 143(3) and 151(4) RTA88 (actual knowledge or constructive knowledge). However, the 2015 Agreement has referred to the issue of interpreting the term 'knowledge' instead as'"had reason to believe' to the case of *White v White* [2001].[127] Nonetheless, the term still looks vague and insurers can still have chance to argue in order to exclude some claims. Moreover, the author argues that cl 13 of the UDA 1999 unlawfully imposes some conditions on victims to be met prior to any claim of liabilities such as a victim must report the accident to the police where the driver has no or for any reason failed to provide his insurance details.[128]

Marson and Ferris (2016)[129] also assert that the UDA 2015 has gone further when it allowed the MIB to deduct payments or totally avoid liability to uninsured drivers victims (see *White v White* [2001]).[130] The authors believe that the UDA in cl 6 is in breach of the MVID as it exceeded the limitation of exclusions, which is, according to the MVID, specified to two instances. The first, when a victim knowingly let him/herself to be a passenger in an uninsured car. The second, to avoid double payments of compensation. For example, Bevan[131] in *Delaney v Pickett & Tradewise*

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[126] Bevan (n 72).

[127] *White v White* [2001] UKHL 9.

[128] Bevan (n 81).

[129] Marson and Ferris (n 82).

[130] *White v White* (n 128) at [34].

[131] Bevan (n 120).

[2011][132] argued that cl 6 of 1999 Agreement is incompatible with the EU and the defective implementation of the EU Directive is of an adequate reason to permit an award.[133]

Marson and Ferris (2016)[134] maintain that cl 6 of the Agreement allows the MIB to exclude their liabilities or to apply deductions to a victim's entitlement that he or she would have received in a case against an insured driver. The exclusions that relates to payments such as the Criminal Injuries Compensation Authority and other exclusions where a victim loses his or her right to claim as a consequence of failing to claim according to the required rules (paragraph 3). The authors also claim that cl 7 can be misused by the MIB to avoid liability for damage to vehicles, not only to people involved but to third-parties too where, at the time of causing damage, the vehicle responsible for the damage was not insured. However that may include victims who are unaware of the uninsured driver or have no connection to him at all to know or ought to have reason to believe his policy legal position and therefore be prevented from their entitlement of compensation for only having their car parked in public places such as roads and car parks. In addition, they believe that cl 8 where a victim who is at the same time a passenger try to bring his claim against the driver who caused the accident may not be able to pursue his claim against the MIB, if the driver was uninsured as the MIB may exclude him from compensation if for instance the claimant let himself voluntarily to be carried as a passenger and he knew or had reason to know that (i) the vehicle was stolen or was unlawfully taken and (ii) the car has no insurance in the first place according to the RTA88. These apply not only to a passenger who knew or ought to know at the time before journey starts but it is continues responsibilities where they are liable if they could let themselves off the vehicles and refuse to take an action accordingly. The authors claim that there is no such responsibility

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[132] *Delaney v Pickett & Tradewise* [2011] EWCA Civ 1532, [2011] All ER (D) 201.

[133] Bevan (n 72).

[134] Marson and Ferris (n 82).

required by the Directives. Finally, the authors assert that when the Secretary of State and the MIB updating their Agreements on some of the issues relating to untraced or uninsured drivers they however, failed to take into account victims who were affected by previews Agreement as those victims would be subject to the Agreement based on the dates where their incident have taken place. In consequence, the authors believe that failing to cover victims under previews Agreement by the new rules of the new one, will lead to legacy breach and therefore victims would still suffer the consequences of the first failure. Moreover, Marson and Ferris (2017)[135] emphasise that both the UDA 1999 and 2015 are in breach of the Directive when it excluded the MIB from being sued by third-party if for instance, the claimant (third-party) himself was uninsured.

Bevan[136] in this regard, accused the Department for Transport of being disingenuous when they claimed that the UtDA 2003 and the UDA 1999 had been reviewed and are, collectively with the RTA88, fully compliant with the EU law. He believes that these changes are contrived and misleading and prove that the intention of the MIB is not to work in line with the EU directives and protect innocent third-party victims but to protect their own interest. He asserts that such disingenuous behaviour may undermine any confidence in them to work in good faith as it should be when enacting laws. Others, such as Marson and Ferris (2016)[137] claim that the Ministry for Transport's assertions that the UDA 2015 is in compliance with the EU Directive is a false claim as they have failed to transpose the Directives correctly. The authority for instance, in cl 6 failed to strip the MIB from their authority to avoid liability or to reduce payments that victims of accident are entitled to.

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[135] Marson, J., and Ferris, K. 2017. Motor Vehicle Insurance Law: Ignoring the Lessons from King Rex. 38(5) *Business Law Review* 178.

[136] Bevan (n 72).

[137] Marson and Ferris (n 82).

2.6.6. Victims of Derogated Vehicles

Bevan (2016)[138] arguably discusses s 144 (1) RTA88 as to whether the Minister has the right to exempt some bodies from having insurance under s 143 when they provide security of £500,000.[139] He argues that the amount is insufficient to meet the minimum cover requirement, which is imposed by Article 9. He also contends that s 144(2) exempt derogated bodies such as Local authorities[140] from the duty of the same section (s 143 RTA88) to have their vehicle insured may lead some victims to end up empty handed or getting less than what they should have be paid as for example, the UDA 1999 does not meet claims where that the RTA88 does not require third-party motor insurance cover. However, Merkin and Hemsworth[141] claim that Article 5 (1) MVID, in some circumstances, allows such derogation (exempting certain categories of vehicles from insurance obligation)[142] where for instance, third-party victims' rights for compensation are protected by certain provisions that are made by Member States of the EU. The MIB Agreement however, does not cover any motor vehicles that does not conform to s 185 RTA88 definition of 'motor vehicle'.[143] Nevertheless, The Directive clearly states that the derogation shall not prevent third-party victims of their rights and Member States must take all appropriate measure in order to protect these rights otherwise the derogation is not permitted.[144]

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[138] Bevan, N. 2014. Ignore at your Peril. 164 *New Law Journal* 7628.

[139] The sum originally demanded by the Road Traffic Act 1930, by s 20 of the Road Traffic Act 1991

[140] The RTA 1988 s 144(2)(a), where however a certificate must be produced.

[141] Merkin and Hemsworth (n 62).

[142] RTA 1988 s 189.

[143] Bevan (n 81).

[144] Merkin and Hemsworth (n 62).

2.6.7. The Scope of Cover

Bevan (2016)[145] argues that the Ministry for Transport failed to comply with the geographical scope of the EU (see *Vnuk* [2014]).[146] He claims that the CJEU has clearly stated in this case that the Directive's aim to facilitate the movement of individuals across Europe as of the same importance of guaranteeing third-party victims. Therefore, according to the author the scope must be extended to cover any use of motor vehicles on any land which is consistent with the normal function of a vehicle.[147] Furthermore, applying the approach of *Vnuk*[148] means that the location where the accident takes place is irrelevant as far as the accident arises out of the use of a vehicle (consist with normal function).[149] However, after the ruling of the CJEU, *Vnuk*,[150] the UK was heavily criticised for not extending its liability to include the use of any vehicle with normal function of a vehicle on any place to come in line with the EU Directive.[151] Nonetheless, Bevan (2015)[152] does not deny that there was an extent to the cover of the geographical scope in *Cutter v Eagle Star Insurance* (1998),[153] he however, argues that it is still far beyond the required level to come into line with Article 3(1) of the First Motor Insurance Directive as stated in ss 143 and 145 RTA88. The Motor Vehicle (Compulsory Insurance) Regulations 2000 extended the scope of geographical cover under

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[145] Bevan (n 81).

[146] *Vnuk* (n 11).

[147] Bevan (n 72).

[148] *Vnuk* (n 11).

[149] Merkin and Hemsworth (n 62).

[150] *Vnuk* (n 11).

[151] Bevan, N. 2015. A Call for (More) Reform. 165 *New Law Journal* 7661.

[152] Bevan (n 99).

[153] *Cutter v Eagle Star Insurance* [1998] UKHL 4 All ER 417.

s 145 as well as the scope of duty to insure s 143. Bevan (2013)[154] also argues that the implications of the restriction in the scope of cover does not only affect the liability of having a third-party cover according to the RTA88 under ss 143 and 145, and when and to what extent the MIB is liable for compensating third-party in accidents involving a use of a vehicle, but it also has an effect on the implementation of Article 18 (Rights Against Insurers Regulations 2002) direct right of action. For instance, the 2002 Regulation 2(3) requires the insurance policy to comply with s 145 RTA88, which restricts the direct right of action to only UK's insurers which are members of the MIB.[155] Therefore, the foreign registered insurer responsible for an accident in the UK is excluded.[156] Bevan (2016)[157] as well as Marson et al (2017)[158] believe that the *Delaney*, *Vnuk*[159] and *Churchill Insurance v Wilkinson and ors* [2012][160] are clear evidence that the statutory and extra-statutory provision of the UK are inconsistent with the EU law. However, the authors went further arguing that the illegality of exclusions and restriction leave lay people in conundrum position of uncertainty and it contradict not only the EU Directive but also the road traffic act 1930.

In this regard, Merkin and Hemsworth[161] believe that Article 14 of the MVID is to be interpreted in such way where any policy issued by an EU Member State, its cover shall satisfy all compulsory requirements of all other EU Members. Finally, the authors argue that despite the amendment of the

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[154] Bevan. N. 2013. On the Right Road? (Pt II). 163 *New Law Journal* 130.

[155] RTA 1988 s 145(1), which provides that a compulsory liability policy must be issued by an authorised insurer, and s 145(1) which provides by reference to the definition in s 95 that an authorised insurer is one belonging to the MIB.

[156] Bevan (n 81).

[157] Bevan (n 81).

[158] Marson et al. (n 66).

[159] *Vnuk* (n 11).

[160] *Churchill Insurance v Wilkinson and ors* [2012] EWCA Civ 1166.

[161] Merkin and Hemsworth (n 62).

RTA88 (the Motor Vehicle, Compulsory Insurance Regulation 2000) that accident on roads should cover 'any public place.' It is however, still too restrictive as it covers only on top of the roads car parks and other public places where public have access to while the EU law requirement is to cover any use of a vehicle anywhere.

2.6.8. Misallocation of Claims

Bevan (2016)[162] argues that article 3 (1) of the first directive clearly states that insurers cannot rely on statutory provisions or contractual clauses in order to avoid responsibilities for compensating third-party victims, who involved in road traffic accident caused by insured vehicle. Therefore, victims of such an accident shall be entitled to full amount of compensation as it is fixed in Article 1(2) of the Second Directive.[163] The author also believes that Members of the EU must not misinterpret the Directives' aim to allow themselves to prevent victims' rights from compensation for any personal injuries or property damage in any means. In this regard, Marson and Ferris (2016)[164] however, believe that there are many procedural irregularities, which help insurers to avoid paying the right amount of money to victims of road traffic accident, (for example, the 1999 Agreement) failed to address and deal with in a clear simple way is the conditions precedent to liability, specifically the ones related to the notice provision required in issue and service of proceedings. The authors claim that claimants are confronted by many different misleading notice requirement such as reporting their claim to the police within certain time in order to process their claims, which is completely different from the normal requirements in civil claims. For example s 152 RTA88 and cl 9 of the MIB's Agreement (2015) are well used by the MIB and insurers to fully

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[162] Bevan (n 81).

[163] The Second Motor Insurance Directive 30/12/1983 (84/5/EC)

[164] Marson and Ferris (n 82).

avoid claims or to reduce the amount of compensation. Referring to Marson and Ferris' claim, Bevan (2015)[165] believes such disingenuous work is definitely oppose Article 10 of the MVID, which clearly states that the compensation shall be '*at least up to the limits of the insurance obligation for damage to property or personal injuries'*. However, the earlier mentioned authors believe that one of the most important achievement of the 2015 Agreement is that the requirement under the 1999 Agreement which is related to notice provisions in issues and service of proceedings are no longer required by the 2015 Agreement to join from the beginning. Clause 13(1) where the MIB can directly be part of the proceedings regardless of the precedent rules of *Gurtner v Circuit* [1968].[166] Further, cl 13(2) states that for a claimant to include the MIB from beginning, he or she needs to be reasonably believing that there is an insurer and give notice according to the RTA 1988. Moreover, cl 13(2) permits the MIB to join from the beginning, it does not however, provide enough protection to a claimant where he or she for instance, fails to give notice to an insurer according to the RTA88 or the ones who relied on the European Communities Regulations 2002 (Rights against Insurers) to bring their claims against an insurer directly. (if the insurer was sued wrongly as it has no contractual liability towards the driver).[167]

Marson and Ferris, Merkin and Hemsworth and Bevan believe that there is an urgent need to consider that the Uninsured and Untraced Drivers' Agreements shall be scrutinised in order to remove any unlawful exclusions of liability that the private body (MIB) is currently using (for instance some procedural knock-out clauses) where the MIB uses its power to design and keep such procedural and unlawful exclusions in order to avoid or deduct third-party compensatory entitlement. However, claiming that the EU Directives allow some exclusions in Member State

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[165] Bevan (n 99).

[166] *Gurtner v Circuit* [1968] 2 QB 587.

[167] Merkin and Hemsworth (n 62).

based on each Member legal system is false and has no credit as the CJEU always ruled that no Member State has a discretion over third-party victims' entitlement according to the Directives, the authors claim.

2.6.9. Subrogated Claims

The aim of Article 75 is to ensure that a claimant cannot be compensated more than he or she is entitled to (in avoiding double-compensation) where an insurer, after indemnifying the claimant, can act on behalf of him or her against the wrongdoer as the wrongdoer has no link whatsoever to the insurance policy. Therefore, he or she should not be entitled to gain any benefit from the policy[168] (see *Caledonia North Sea Ltd v British Telecommunications Plc* [2002]).[169]

Bevan (2015)[170] believes that Article 75[171] has been used by insurers (act as MIB) to avoid subrogated claims (cl 6 of the 1999 Agreement). The article is used to decide whether there is a subrogated claim or not and therefore the MIB is liable for such claims or not which, may undermine the purpose of EU Directives of protecting victims of third-party. However, the author claims that the new Agreement extended the scope of subrogated claims to include all claims or any part of claims where claimants are entitled to compensation or have already received one. It is also worth mentioning here that the EU Directives only allows deduction from a victim's compensation award where he or she was awarded a compensation from, for instance, other insurers or social security body for the same damage (accident). It has been justified that Member States still obliged

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[168] Merkin and Hemsworth (n 62).

[169] *Caledonia North Sea Ltd v British Telecommunications Plc* [2002] Lloyd's Rep. I.R. 261.

[170] Bevan (n 99).

[171] Article 75 (of the MIB's internal rules).

to fully compensate victims for an accident without allowing subrogation as such permission may lead to double-compensation. However, Article 10 the exclusion is restricted to where a person let himself voluntarily to enter the vehicle that caused the accident and the defendant can prove that the person knew the driver was uninsured.[172] In this regard, Marson and Ferris (2017)[173] believe that cl 5 of the UDA 2015 is in breach of the EU Directive when it allows the MIB to avoid its liabilities to act as a last resort so that third-party victims can get their claim satisfied. The clause however, as the authors claim exempt vehicles, which do not require insurance in the first place such as local authorities, as claims of those local authorities' vehicles are to be met through the authorities directly and not through the MIB, which may lead to some sort of uncertainty as the UK, according to the EU Directive, is still in charge of having a appropriate mechanism to ensure that victims of those vehicle should not be left without fair compensation regardless of who caused the injuries to third-parties. Marson and Ferris[174] and Merkin and Hemsworth[175] claim that according to cl 6 of the UDA 2015, the MIB is not liable for any claim where a victim has received or entitle to receive payment from others. Furthermore, cl 14 of the same Agreement can be used by the MIB to require from a victim, in order to make a payment to take full responsibility to pursue where possible a judgement against others who might be liable for the loss. Nevertheless, the requirements of cl 11(4)(d) of the 2003 Agreement where an applicant has to assign his right to the MIB to any sort of compensation that he might get as a reward from any other source for any damage or injuries does not appear to conflict with Article 10(1) and 10(4) of the MVID as the Directive justify that to avoid

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[172] Marson and Ferris (n 82).

[173] Marson and Ferris (n 136).

[174] Marson and Ferris (n 82).

[175] Merkin and Hemsworth (n 62).

double payment (cl 6 of the 2003 Agreement allows the MIB to exclude or limit its liability in such cases).[176]

On one side, Bevan (2015)[177] argues that the MIB is inconsistent with even the UK law (RTA88 Part VI) as they refuse to meet any liability occurs from an incident involving a trailer. He however, claims that in the new Agreements (2015) the MIB has moved a bit forwards to extend its liability to include a claims where the use of trailer is in a stationary, uncoupled and or moving uncoupled trailers and regardless of any other circumstances of whether the trailer is insured or not, and in case of a trailer was insured, then the MIB can go back to the insurer and recover their financial loss from them. On the other side, Marson and Ferris[178] believe that there are inconsistencies between the two Agreements where the exclusions of UtDA regarding passengers' knowledge and subrogate claims are different from the once in the UDA and by not having both Agreements to have the same definition of the exclusion it would be considered as a defect in the legal system.

Finally, Marson and Ferris[179] as well as Bevan[180] argue that the Minister for Transport needs to work more on its failing to work in line with the EU Directives by having more supplementary agreements aiming to fix the gaps, which arising from the different approach and provision used by the UK legal system in regard of the untraced/uninsured drivers.(legislation).

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[176] Consolidated Motor Insurance Directive 2009/103/EC.117

[177] Bevan (n 99).

[178] Marson, J. and Ferris, K. 2017. Misunderstanding and Misapplication of Motor Insurance Law. Will the Supreme Court come to the Rescue? 23 European Journal of Current Legal Issues (2).

[179] ibid.

[180] Bevan, N. 2013. On the Right Road (Parts I-IV). 163 *New Law Journal*, 7546.

2.6.10. Compulsory Arbitration and Limited Appeals

Marson and Ferris,[181] argue that the MIB, according to the UDA 1999, can decide not to compensate a victim where the victim fails to provide information about the relevant proceedings according to cl 7(1)(b) and (c) where such requirement has no reference to nether the MVID nor to RTA88 (CJEU's ruling in *Evans*). The authors believe as well that cl 17 of the UDA 2015 may have a negative consequence on victims' right as disputes between the MIB and a victim, if was not settled amicably, then according to the MIB's requirement under cll 12 or 14 the case must be referred to an arbitrator. The problem arises, as the authors claim, when considering subsection 3 as the dispute is determined by the appointed arbitrator based on written submission and the decision is final. Therefore, no appeal, no cross-examination of witnesses and no reference to EU law. Further, they believe that to achieve certainty in this regard, then rational procedural elements must be reconsidered and secured. However Merkin and Hemsworth[182] have a different opinion regarding this issue as they believe that since the 2003 agreement was passed things have been changed as the agreement complies with the EU law on at least two different aspects (a) procedures and (b) assessment of compensation. It has become easier than before, for either party to request an oral hearing once a preliminary award was decided by an arbitrator or at later stage after the award being given where there are new evidence arisen. However the authors believe as well that an applicant can be represented by a lawyer and he is entitled to call for witnesses to be questioned by the arbitrator according to the same agreement (the 2003 agreement). In this regard, Bevan (2015)[183] believe that the right to appeal is extremely limited where unsatisfied claimant can appeal

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[181] Marson and Ferris (n 82).

[182] Merkin and Hemsworth (n 62).

[183] Bevan (n 99).

to the Secretary of State now however it is replaced with a QC arbitrator. Therefore, such deficiency may undermine the goal of EU Directives. The authors maintain.

2.6.11. Terrorism Exclusions

Unfortunately, neither the RTA 1988 nor the Agreements have applied provisions or admitted any responsibility to support victims of terrorism act that caused them loss and suffer. Bevan [184] argues that there is no lawful reason as to why those victims shall be excluded. Is that related to the level of damage and loss that such action can lead to, or those victims do not deserve protection or whether the government is looking at the level of damage and loss and what caused them? He believes that the government shall only consider how to support suffering third-party victims regardless of anything else.

Other such as Merkin and Hemsworth doubt the legality of the terrorism exclusion and whether insurers shall be liable for any financial consequences follow an attack on public places and cause injuries, loss of life and property damage. However, Marson and Ferris[185] believe that referring to the Directives, it can be argued that such liability cannot be within the scope of the policy as the cover is intended to cover '*a normal use of vehicle*' and therefore it is out of the scope of the policy. Furthermore, Bevan[186] states that it is clear that there is no such cover or even intent by the RTA88 or any other supplementary Agreement to have such cover. For instance, the UDA 2003 was clear about terrorism exclusion that no liability can be occur in such incident (terrorist acts) against the

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[184] Bevan, N. 2011. Part II: Why the Uninsured Drivers Agreement 1999 Needs to be Scrapped' *Journal of Personal Injury Law*, Issue 2, 123.

[185] Marson and Ferris (n 82).

[186] Bevan (n 185).

MIB. As well as cl 9[187] of the UDA 2015.[188] Marson and Ferris,[189] for instance, support the previous claim that the UtDA 2003 cl 5(1)(g) which, take an effect in the same year, and it was incarnated in cl 9 of the UDA 2015 that in both Agreements the MIB played well in this regard to have no responsibilities or any sort of direct or indirect liabilities towards any claim arising out of act of terrorism (s 1 of the Terrorism Act 2000). They however, argue that regardless of how broad is the definition of terrorism act[190] is the authors believe that taking EU Directive definition into account '*a normal use of a vehicle*' makes no doubt that a vehicle been used for such purpose does not constitute of normal use but as a weapon cannot be considered as a breach of EU Directive. They however, believe as well that it would be better if the Agreements did not adopt a controversy broad definition that has been enacted prior to its enactment. They also argue that one may say that cl 9 did not mention '*a normal use of a vehicle*' as EU Directive did therefore it may be considered to be as a breach of EU law.[191]

However, Merkin and Hemsworth[192] state that in regard to this area of dispute, it cannot be understood and hard to distinguish where a person fleeing from an incident where the driver has just murdered someone and on his way to flee the scene, he hit somebody and caused him severe injuries (the claim is allowed) whereas if the murderer has, however, just fled an attack on abortion clinic, the claim cannot be allowed but excluded. Therefore, and according to the author point of

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[187] The MIB is not liable for any claim, or any part of a claim, where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism within the meaning of s 1 of the Terrorism Act 200*0.*

[188] Bevan (n 99).

[189] Marson and Ferris (n 82).

[190] TA 2000 definition of terrorism is itself questionable as to its appropriateness for the various purposes to which it is applied - see Walker, C. Terrorism and the Law (OUP Oxford 2011).

[191] Marson, J., and Ferris, K. 2016. The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority' 38(2) *Statute Law Review*. 133.

[192] Merkin and Hemsworth (n 62).

view that the exclusion must be scraped and a new legislative to be enacted in order to make the law clearer simpler and fairer to all third-party victims regardless of the scenario of how the incident was taken place to secure third-party victims' rights. Furthermore, they believe that it is simply contradicting Article 13 of the EU Directive, which only allows one exclusion.

2.7. Conclusion

Based on what have been discussed in this chapter, we can conclude that academics and authors such as Marson and Ferris, Bevan and Merkin and Hemsworth, believe that up to now the UK does not comply with the aim of the Directive to facilitate the free movements of people, goods and vehicles of all EU citizens. They believe that the national law underpins the aim of the Directives by for example allowing some exceptions in order to avoid its liabilities regardless of the implication that may arise as a consequence of CJEU rulings. Marson and Ferris[193] for instance believe that for the UK's national law (motor vehicle insurance procedural and provisions) to meet the required legitimate expectations and to eliminate any cause of uncertainty to the legal system, and work in compliance with the EU Directives then most of the agreements should be canceled and a new agreement should be considered by the authority as a necessary action to guarantee innocent third-party victims' rights and therefore avoid injustice by having clear, precise and predictable rules. Others, like Bevan (2015)[194] went further and asked in a letter to the Minister for Transport to *'undertake a root and branch review of the entire national law provision for third party motor insurance as well the compensatory schemes for victims of uninsured and untraced drivers*.' The author point of view reflects the scope of defect system in comparison with EU law. Further, he believes that all related provisions of the UK legislation including the Agreement with the (MIB)

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[193] Marson and Ferris (n 192).

[194] Bevan (n 152).

that govern third-party insurance need to be scrutinised and brought in line with the EU law. He claims that the primary and secondary sources need an urgent review as far as the UK is obliged to implement EU law.[195] However, the literature has demonstrated gaps in the research and analysis of the law relating to motor vehicle insurance. First, there is no assessment presented on the latest 2017 UtDA. There is no critique of the consultation document in relation to the geographic scope of compulsory motor insurance and the developments for a seventh MVID. Most significantly, no one has presented an argument or considered whether State liability actions (which admittedly have had some success in the area), may not be the best way of granting access to EU rights and to ensure legal certainty. Arguments for the disapplication of offending aspects of national law may provide the very certainty and access to justice removed from the current legal system.

[195] Bevan (n 72).

CHAPTER THREE: The Motor Vehicle Insurance Directives

3.1. Introduction

Motor vehicle insurance law has been subject to significant influence from the EU. The free movement principles upon which the Single Market is based are principal aims to facilitate the movement of goods and people throughout the trading block. It quickly transpired that to ensure the free movement of people and of goods, transport was an essential component. To facilitate this, a system of EU-wide measures relating to the minimum compensation standards for the insurance of vehicles to protect the third-party victims of motor vehicle accidents was required. Such a harmonised approach would enable vehicles to travel between and through the territory of Member States without being subject to checks identifying that minimum insurance coverage is in place.

In this respect, two sources of law regulate this area, European law and national law. In this chapter, a systematic examination of the relevant EU legislation (the Motor Vehicle Insurance Directives - MVID) alongside the UK's national law (namely the Road Traffic Acts and the Agreements reached between the Motor Insurers' Bureau and the UK) is provided. It highlights some of the more egregious breaches and deficiencies between the EU parent Directives and the national implementing legislation, and how this affects legal certainty for all actors. However, before proceeding to critically examine national law, it is crucial to explain the nature and significance of the EU law and its effect on national law. In this respect, the author will focus on the MVIDs' requirements as to ensure the protection to third-party victims of road traffic accidents is provided.

3.2. EU Legislation; What Type of Legislation?

In this respect, and as mentioned above, the type of legislation that was chosen to deal with the Motor Insurance rules and regulations is Directives.[196] The EU's choice of legislation was in the form of a Directive as such an instrument provides flexibility through establishing *'... a goal that all EU countries must achieve.'* Directives do not specify how such goals are to be achieved, rather it is for '… *individual countries to devise their own laws on how to reach these.'* Thus, the EU provided Member States with discretion as to how best to achieve the objectives set out in the Directive. However, discretion or freedom to implement the MVIDs has to be taken in accordance with the principles of EU law (such as the equivalence and effectiveness principles) and in ensuring the aims and objectives of the Directive is achieved or otherwise a non-compliant State might achieve an advantage over other, compliant, States.

3.2.1. The Motor Vehicle Insurance Directives

The MVID started with the enactment of the First Directive in 1972. This led, through a further five iterations, to the consolidated Directive (2009/103 EC) in 2009. The evolution of the MVID across these legislative initiatives allowed for developments to third-party rights and to fulfil the harmonisation of the law among the Member States. Such action would help to accomplish the underlying aim of free movement. In other words, the purpose of these Directives was to deliver a consistent approach across the Community to ensure that there is always cover for civil liability in regard of motor vehicle use. The MVID, however, do not require a Member State to alter its civil law, but to ensure the objectives set out by the Directives would not be undermined by national

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[196] Article 288 of the TFEU states that *'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.*

laws. As a result of such an approach, the achievements of the MVIDs aim varied from one Member State to another. The wide discretion granted under the MVIDs has led to implementation which is quite inconsistent and, in some instances, may even operate to limit the protection for third-party victims as Member States seem to be more satisfied having 'some' third-party cover in place rather than ensuring full compliance with the MVID.

The First Motor Vehicle Insurance Directive was largely considered to be ineffective in facilitating the free movement between EU Member States. It failed to protect third-party victims by providing clear legislation to be applied in the EC. As a result of this first failure, the Second and Third Directives were passed to overcome the negative consequences of the First by being more precise as to, for instance, which terms and conditions governed third-party victims' claims. As way of an example, minimum levels of financial cover were imposed in the Second MVID and exclusions, in respect of third-party victims, were limited. Furthermore, the Second MVID required Member States to establish a central funded body so third-party victims would not be left without fair compensation due to for example, the financial circumstances of the party causing loss or injury (this body in the UK was the Motor Insurers' Bureau - MIB). The Third MVID extended protection to include a greater range of victims. Later still, the Fourth and Fifth MVIDs imposed certain legal requirements on Member States to overcome the previous MVIDs' drawbacks and to ensure harmonisation in this area of law (the compulsory insurance rules) within the Community, which will be discussed in more detail later in this chapter.

In respect of the UK, some of the MVIDs requirements, such as the rights of third-party victims, were protect by law (the Road Traffic Act 1930 (RTA30) s 143) – unsurprising given that the RTA30 was the inspiration for the first MVID. It was illegal for the owner of vehicles in the UK to drive without a minimum of third-party cover. However, such an obligation did not provide full

protection to all innocent parties of motor vehicle accidents, only to victims involved in accidents where the wrongdoers were insured and identified and the accidents had taken place on a road (and latterly 'or other public place'). Therefore, many victims of uninsured or untraced drivers had no route to compensation. The need for a new mechanism that could guarantee the rights of victims of untraced and uninsured drivers and to work in conformity with the MVIDs became an issue that the government could no longer ignore. The result was the government entering into an arrangement with the MIB, through extra-statutory arrangements, to overcome the shortfalls in coverage found in the RTA30. The Agreements (the Untraced Drivers' Agreement (UtDA) and Uninsured Drivers' Agreement (UDA)) were signed between two parties, the Government and the MIB, and whilst they were supposed to provide the required protection to innocent victims of negligent uninsured and untraced drivers, they have not proven to have been completely successful in this aim. Both the RTA30 and its most recent iteration the Road Traffic Act 1988 (RTA88), as well as the extra-statutory agreements, failed to achieve the obligations required under the MVID to protect third-party victims.

3.2.1.1. The First MVID

The purpose of the First MVID (72/166/EC), which was enacted in 1972 sought to ensure that EU Member States would, *inter alia***,** *'... take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in their territory was covered by insurance*.' However, and according to the same article, the terms and conditions of the cover *'shall be determined on the basis of these measures.'* Member States were given a wide discretion on how to implement the Directive. No obligations were imposed on Member States to what terms and conditions of cover shall or shall not be permitted and to what extent. Rather the MVID left it for Member States to choose how to achieve the Directive's objectives.

Article 3(1) of the First MVID for instance, requires vehicle owners to have a minimum of third-party cover, which is legally binding for settling any civil liabilities arising out of the use '*normal use'* of the vehicle anywhere in the Community. In this respect, a motor vehicle is defined as the following *'... any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled*.'[197] According to this article, a vehicle that does not fall under this definition will not be required to have insurance. Nonetheless, in this regard, the scope of cover (in terms of where and which type of vehicles) were extended to cover a greater range of vehicles, an unprecedented step in the history of insurance.

However, the First MVID did not aim to harmonise the scope of insurance or other insurance rules against civil liability, instead it was concerned with ensuring the existence of insurance cover against civil liability in place for all vehicles. This was interpreted differently by EU Member States and led to inconsistent rules applying throughout the Community. Moreover, under Article 3(2) of this Directive, policies issued by insurers had to have liability cover for civil liability that may arise as a consequence of the policyholders' journey to other EU Member States as well as in the territory of these States within the Community. However, Article 4(a) of the First Directive did allow Member States to derogate certain vehicles from the compulsory insurance requirement scheme as required under Article 3(1). The derogation was not unconditional and necessitated some sort of compensation scheme in existence to cover liability incurred by derogated vehicles.

Under this Directive,[198] Member States were required to facilitate free movement between the States without the need for border checks, and it fell to each Member State to ensure that a vehicle

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[197] Article 1 of the First MVID.

[198] Under Article 2(1) of the First MVID.

entering its territory from outside of the Community held the correct insurance cover as required by the Directive.[199] Despite its initial positive movement to regulate motor vehicle insurance, the First Directive was basic in its requirements and its lack of clarity allowed differences in the level of protection provided by EU Member States. This in turn had led to restrictions of cover and unlawful exclusions of liabilities applied by insurers in different Member States. Its wide discretion also meant (as interpreted) that insurers had the power to impose exclusions and restrictions not only against the policyholders (if they were victims at the same time as, for instance, passengers) but against third-party victims too who had no say whatsoever in the contract. Nevertheless the negative consequences of compulsory motor insurance cover required under Article 3(1) of the First Directive could have been avoided had Member States interpreted the Article as to allow third-party victims of road traffic accidents to be compensated, not a permission for insurers to limit their liability to some categories of damages inflicted on third-party victims' claims (which oppose the aims of the MVID and work to undermine its effectiveness).

3.2.1.2. The Second MVID

The First MVID was deemed to have been somewhat ineffective in achieving its goal of protecting third-party victims of road traffic accidents in the Community, as well as facilitating the free movement of people and goods due in no small part to differences in implementation throughout the Community. The Second MVID, therefore, aimed to overcome these shortfalls present in the First Directive by restricting the rights of Member States to limit, restrict or exclude liabilities with regards to third-party victims' claims. The Second Directive restricted insurers' rights to exclude claims brought by third-party victims based on national provisions or contractual terms as it has been realised that there was no point in enforcing insurance if insurers could avoid lability based on

[199] Article 6 of the First MVID.

policy terms designed and included in the contract formed by them (the insurers). For example, under Article 4(2), EU Member States were permitted to allow insurers to exclude liability where the vehicle concerned was stolen or obtained by use of violence. However, and demonstrating the importance of this Directive, other limitations, restrictions and/or exclusion clauses imposed by insurers applying to the contracting parties did not extend to third-party victims. For instance, insurers were unable to impose exclusions which purported to avoid liability for accidents caused where a person with no express or implied permission to drive the vehicle was involved in an accident, or who has no driving licence, or because the condition of the vehicle concerned failed to meet the legal requirement to be used on the road.

Under this Directive,[200] EU Member States were required to establish a compensatory body so that the unmet claims by victims of uninsured and untraced drivers could be satisfied (at least up to the minimum level required under the Directives). However, the Directive permitted the compensatory body to exclude its liability in certain circumstances where a) a victim allowed himself to be carried (voluntarily) in an uninsured vehicle and the compensatory body could prove that the victim knew that the vehicle was uninsured; b) property damage was caused by the untraced driver; and c) property damage caused by the uninsured driver where victims were required to pay five hundred Euros in order to hold the compensatory body liable for compensation. Nevertheless, the role of this body is not left to be determined by the States but subjected to the EU principles of equivalence and effectiveness. Furthermore, Article 3 of the Second Directive did not permit exclusions based on a family relationship with the driver when the victim suffered personal injury. However, Member States were not to exploit exclusions permitted under the Second Directive for their own interests, rather the Directive and its exclusions were to be interpreted restrictively. However, and as far as the UK is concerned, insurers were able to deny liability against a third-party where their policy

[200] Article 1(4) of the Second MVID

terms were breached, but would have to remain dealing with such claims as agents of the MIB under what is called an Article 75 (of the MIB's Articles of Association) action.[201] Compared with other Member States such as in Germany and Finland, insurers are prohibited from taking advantage of other exclusion clauses and they were obliged to meet their legal obligations regardless of the terms of their insurance policies. In Belgium, for instance, insurers were permitted to avoid liability if the insured was in breach, but only because the national compensatory body meets all third-party claims that were avoided by insurers.[202]

Under this Directive, cover was extended to property damage, the policy excess was limited and a minimum level of financial cover was imposed on insurers. However, and as far as the UK is concerned, there is no limit for personal injuries in national law (a minimum of 350,000 Euros per victim, under the Second Directive), and £250,000 for property damage in UK law (a minimum of 100,000 Euros for all victims, under the same Directive). Nevertheless, under Article 1(1-3), EU Member States can limit the cover to a minimum of 500,000 Euros where more than one victim is involved in an accident leading to personal injuries, and to a minimum of 600,000 Euros where an accident involves personal injuries and property damage. In France, the compensatory body meets its obligation in respect of both personal injury and property damage where an uninsured vehicle causes damage to a third-party, while in Italy the same body can deny responsibility in respect of property damage if the vehicle concerned is registered in the Member State where the accident takes place.

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[201] The Articles of Association will be thoroughly examined in Chapter Four.

[202] The report on the Proposal for the Second MVID on the approximation of the laws of EU Member States relating to insurance against civil liability in respect of the use of motor vehicles [Doc 1-466/80].

To conclude, the compensatory bodies required under this Directive generally exist to ensure that third-party victims will not be left uncompensated in the event of an accident involving a vehicle. Their existence may, however, encourage insurers to attempt to avoid liability in ways that would be difficult without such a scheme.

3.2.1.3. The Third MVID

Although the Second MVID removed some of the disparities present in the First MVID by restricting the wide discretion given to Member States in that Directive, it still did not achieve the central aim of protecting free movement. The geographical scope of cover provided by insurers under Article 3 of the First MVID for instance, did not provide certainty as to facilitate the unfettered movement from one State to another. The requirement of third-party cover that is restricted to one State where the policyholder lives does not serve the aim of having a 'single Community' (free movement of people and vehicles). Therefore, the need for the cover to be extended, with no extra charges to other Member States, became necessary. A Community under different levels of protection or one which operated a system of different treatment depending on the origin of the vehicle is not a single community. That led to a new requirement under Article 2 of the Third MVID to ensure that EU Member States extended compulsory insurance to cover all EU States and not only the State where the policy was issued. Furthermore, the Third Directive played a major role in harmonising national laws of the Member States in this regard by permitting certain exclusions exclusively when stated clearly that other exclusions, restrictions or limitations were to be deemed as a breach of the MVID. Negative consequences existed for States in breach which could include the imposition of a fine or their suspension from the EU, until they remedied the breach.

In respect of passengers' claims, and although the Second MVID ensured that the rights of the insured's family as passengers were protected against any exclusion clauses, the protection provided under the Second Directive left other passengers with no protection. Some Member States such as Greece did not provide any cover for passengers.[203] Others denied responsibility where the owner of the concerned vehicle was a passenger at the time of the accident.[204] In this respect, the Third Directive required compulsory cover for passengers' personal injuries, including the insured as a passenger.[205] It, however, excluded only the driver in cases of stolen vehicles. In other words, the Third MVID unlike the previous MVIDs, extended the requirement of compulsory insurance cover to all passengers where under Article 12(1) of the Third Directive, passengers other than the driver can benefit from Article 3 of the Directive where claims arise out of the use of a vehicle. However, that is subject to victims who knowingly let themselves in uninsured vehicles and the compensatory body can prove that was the case.

The Third Directive did not permit the compensatory body to impose any obligations on third-party victims of road traffic accidents before payment to prove that the driver at fault cannot satisfy the judgment. Furthermore, under the Third MVID,[206] the compensatory bodies were not allowed to require any proof of the drivers' financial circumstances but to satisfy any claim made by victims of uninsured drivers without unnecessary delay. Finally, under the Third MVID,[207] Member States were required to have in place the right measures so that victims of road traffic accidents could discover the identity of the insurer of the vehicle involved in an accident. The importance of the

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[203] Merkin, R. and Hjalmarsson, J. *Compendium of Insurance Law* (1st edition, 2007).

[204] The UK, for instance, has no compulsory protection for an insured passenger who allows another person to drive his car. See *Churchill v Fitzgerald* [2013] 1 WLR 1776.

[205] Article 1 of the Third MVID.

[206] Article 3.

[207] Article 5.

Third MVID alongside with the First and the Second is that it shaped the most important requirements that third-party victims needed to protect their rights against uninsured or untraced negligent drivers.

3.2.1.4. The Fourth MVID

The Fourth MVID[208] focused on the proceedings of claims to be accessible and issues related to the achievement of such matters were to be resolved as soon as possible. Furthermore, Member States were required under this Directive to ensure that claims involving motor vehicle where a citizen of another Member State was involved as a victim or a vehicle from another State caused damage to people in another State to be compensated without unnecessary delay.

Under the Fourth Directive, third-party victims were given the right to bring their claims directly against the insurers of the driver at fault and in the Member State where the accident took place. The European Communities Regulations (Rights against Insurers) 2002, increased the third-party contractual scheme for such victims to directly pursue their claims against the insurers in order to implement Article 3 of the Fourth MVID.

The Fourth Directive required insurers in the Member States to appoint (individually or jointly) representatives in each EU Member State to deal with claims that may arise out of the use of vehicles, insured according to the Directive's requirement. The representatives then would work on behalf of insurers to collect all necessary information related to the accident and act upon that to reach a settlement. Failing to comply with the Directive's requirements was to be penalised under

[208] 2000/26/EC.

the Fourth MVID.[209] Furthermore, under Article 5, Member States were required to establish an information centre where information relating to motor vehicles in the Member State would be kept and be available for inspection when required, for all vehicles registered in each Member State's territory.

Under this Directive, a victim who suffered loss or injury was entitled to bring their claim either where the incident occurred (i.e. the particular Member State) or in their homeland.[210] The victim was also entitled to receive a reasonable offer of compensation within a reasonable time (three months),[211] and in respect of passengers, the Directive is clear that

> *A passenger shall not be excluded from insurance cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident.*[212]

In *Storebrand Skadeforsikring AS v Finanger* [1999] for instance, the CJEU held that any reduction in compensation would be regarded as a breach of the MVID.[213] Such an exclusion clause (intoxication) of course would not prompt the driver not to drive under the influence of alcohol by depriving his passengers from compensation. Therefore, it should not be permitted and insurers as well as national compensatory bodies cannot claim that drivers in such incidents, for instance, have to bear the consequences of their actions.

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[209] Article 12.

[210] Article 1 of the Fourth MVID.

[211] Article 4 (6) of the Fourth MVID.

[212] Article 4 (1) of the Fourth MVID.

[213] *Storebrand Skadeforsikring AS v Finanger* [1999]. E-1/99] [34].

3.2.1.5. The Fifth MVID

Under the Fifth MVID, the motor insurance rules designed to facilitate the free movement principles were almost complete. Amendments to the previous Directives had been made and some new principles were incorporated too.

The Directive required Member States to deal with any claim (through the Compensatory Body) that takes place on its territory regardless of the legal status of the driver or the place of registration of the vehicle involved in the accident.[214] Member States under this Directive were required to abolish all types of checks, even random ones, on vehicles and at borders for the purpose of insurance requirements.[215] Article 3 of the Fifth Directive extended the right for compensation to nationals of other EU Member States in respect of derogations. In other words, the derogation permitted under Article 4(a) of the First Directive no longer applies to victims if an accident arises in other EU Member States.

Article 4(1) of the Fourth Directive states

> *Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger.*

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[214] Article 1 (1) of the Fifth MVID.

[215] Article 1 (2) of the Fifth MVID.

The Fifth Directive[216] emphasised that a Member State cannot prevent a passenger from compensation when they, for instance, let themselves in an uninsured vehicle or where they knew that the driver, at the time of the accident, was drunk or under the influence of drugs. However, this was deemed to be an amendment of previous exclusions. The Fifth Directive did not permit insurers to rely on such an exclusion in respect of third-party victims. The restriction here comes as an exception to the general compensatory principle so that it cannot be misused by Member States to undermine victims' right to compensation by permitting more exclusions based on knowledge, as is the case with stolen vehicles. The previous Directives, however, operated on the basis of one primary goal - that victims of road traffic accidents could not be left without access to fair compensation. In *Candolin*[217] for instance, the CJEU stated that '*governments… cannot deprive the directives on motor insurance of their effectiveness'* which means Member States should not be permitted to be in a position to rely on their national laws to deprive or even limit the compensation that victims of road traffic accidents are entitled to because of their negligence.

The Fifth Directive increased the level of protection for third-party victims (a direct right was given to third-party victims against the driver's insurers in all circumstances) and it increased the minimum financial requirements as the EU Commission regarded the existing level of compensation as too low. Personal injury, for instance, under this Directive was raised to one million Euros per person instead of 350,000 required under the Second MVID, and five million in respect of many other forms of personal injury, regardless of the number of victims. Furthermore, the Directive required Member States to review the compensation levels every five years. The Fifth MVID removed the exclusion where the compensatory body could avoid its liability unless a

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[216] Article 4 (1).

[217] Case C-537/03 *Candolin v Vahinkovakuutusosakeyhtio Pohjola* [2006] Lloyd's Rep IR 209.

certain amount of money was paid by victims - under of the Second MVID[218] (in regard of property damage caused by an uninsured driver) and altered the exclusion clause of untraced drivers in respect of property damage in cases of significant personal injuries incurred at the same time. The Fifth Directive required Member States to ensure that pedestrians and cyclists were protected by compulsory insurance in the same way under each Member State's national law.[219] Under Article 4(3) insurers could no longer rely on policy terms to claim a policy of insurance was void based on where the vehicle is located and for how long, insofar as that vehicle was still within the territory of the EU.[220]

3.2.1.6. The Sixth MVID

The Sixth Directive is a consolidation of the previous MVIDs, which were repealed and replaced by this Consolidated Directive (2009/103/EC). Therefore this Directive made no considerable changes to existing EU motor insurance law.

The Consolidated Directive does not only aim to facilitate free movement of people and goods between the Member States as one Community but to ensure that the States provide legal protection to victims affected by the use of vehicles in the country. However, the Consolidated Directive does not aim to harmonise Member States' insurance law but only the insurance rules that govern the rights of victims of accidents arising out of the use of vehicles insured according to the Consolidated Directive's requirement. For instance, the CJEU in *Farrell v Whitty and Motor*

[218] Article 1 (4)

[219] Article 4 (2).

[220] Article 4 (3) of the Fifth MVID.

Insurers' Bureau of Ireland [2007],[221] denied that its judgment may have an effect on Irish tort law. Under this Directive, a Member State is expected to use the power conferred on it by the Consolidated Directive to apply it in the way each Member State wishes, but to be in compliance with the Consolidated Directive, which means no contradiction is allowed which might undermine the purpose of this Directive. In this respect, the most relevant articles of the Consolidated MVID to the topic under research are the following;

3.2.1.6.1. Article 3: Compulsory Insurance of Vehicles

Article 3 of the Consolidated Directive is perhaps the most important part in regard of the obligation imposed on Members States to ensure third-party victims of road traffic accidents are protected. Under this article, Member States must ensure that civil liability, in regard of the use of a vehicle on their territory, is covered by a minimum of third-party cover to ensure victims suffering loss or injury in the use of vehicles have their fair compensation met. The Consolidated Directive however, permits some exclusions under Article 5 under what is called 'derogation.' Here a Member State may derogate from the requirements for a vehicle to be subject to compulsory insurance (for example police vehicles and the NHS's vehicles in the UK). Nonetheless, the derogation does not mean that this kind of vehicle does not need to be covered by insurance against third-party civil liability. Rather it is left to local authorities to deal with claims based on its needs. In other words, claims arising out of the use of derogated vehicles will be met by the authority. According to Article 3, insurers are liable and shall compensate third-party victims of road traffic accidents for any personal injuries arising out of the use of a vehicle, regardless of the degree of relation between passengers and the policyholder. However, that does not cover the plicyholder as passenger. Further, and as an incarnation of Article 1 of the Second Directive, the Consolidated

[221] *Farrell v Whitty* (n 100).

Directive requires drivers to have the right cover imposed by the Directive (a minimum of third-party cover).

3.2.1.6.2. Article 10: The Compensatory Body

EU Member States are, under Article 10 of the Consolidated Directive, required to set up a body with a fund that shall be available in respect of unsatisfied judgments. Its primary task, in other words, is to ensure that victims of uninsured or untraced drivers are compensated to the minimum (required) level of compensation that they might secure had the driver causing the accident been insured and the claim brought against their insurer. However, the chosen body has its liability limited to only those vehicles which fall under Article 3 of this Directive, which means that the body required under Article 10 is not responsible for claims caused by derogated vehicles. Nonetheless, this exception is not to be misinterpreted by Member States to avoid liability towards victims of such vehicles, but the States are required to provide another mechanism of compensation such as local authority insurers, securities or another compensation scheme.

Initially, the Compensatory body required under Article 10 is responsible for claims where there is no insurance in the first instance (uninsured drivers), untraced drivers or where an insurer succeeds in avoiding its liability under the exclusion permitted by the Consolidated Directive. The Compensatory Body in such cases must provide compensation to victims at least up to the level paid by insurers had the vehicle causing the accident been insured according to the law. However, in either case, Member States must apply the principle of equivalence and effectiveness of EU law when compensating victims under the Consolidated Directive or otherwise the aims of the Directive would be undermined. Thus, the compensatory body must act reasonably and where exclusion clauses stated by the Consolidated Directive are not applicable, then no one can avoid liability and

victims must be compensated accordingly. Member States are permitted to exclude liability to compensation where a victim voluntarily let himself be carried in an uninsured vehicle and he knew the vehicle concerned was uninsured, and the compensatory body can prove this. Therefore, all other exclusion clauses are prohibited. In *Almeida v Companhia de Seguros Fidelidade-Mundial SA* [2012],[222] for instance, the Portuguese Compensatory Body denied a passenger of his right to recover compensation based on his failure to wear a safety belt and, as a consequence, he was thrown out of the vehicle, in which instance he suffered severe injury. Moreover, the vehicle was uninsured. The CJEU rejected the exclusion applied by the Portuguese Compensatory Body which sought to deprive the third-party victim of his right of compensation and made it clear that no exclusions are permitted in respect of third-party victims apart of that expressly provided for in the Consolidated Directive.

Article 12 of the Consolidated Directive is derived from the Third and Fifth Directives and deal with victims involved in vehicle accidents either as passengers or as pedestrians. For instance, Member States are required to ensure that authorised insurers are liable for personal injuries caused by a driver regardless of their victim. In other words, it removes the discrimination in the scope of cover between third-party victims based on their relation to the driver.

3.2.1.6.3. Article 13: The Permitted Exclusion

Article 13 of the Consolidated Directive deals with exclusions in respect of third-party victims of road traffic accidents (what is permitted and what is not). Under this Article, neither statutory exclusions nor contractual clauses can be used by insurers in order to avoid liabilities for claims made by third-party victims. However, the Consolidated Directive does allow a single exclusion

[222] Case C-300/10 *Almeida v Companhia de Seguros Fidelidade-Mundial SA* [2012] ECLI:EU:C:2012:656.

where the victim knew that the vehicle he is travelling in is stolen and he voluntarily let himself be a passenger - and the insurer can prove that. Hence this requires actual knowledge. Nevertheless, the Consolidated Directive does not aim to restrict the contracting parties' right to negotiate and apply certain terms and conditions that suit the interests of both of them. For instance, an insurer can impose whatever exclusions that suit its interest as well as an insured person can limit their cover to the minimum level to avoid paying high(er) premiums. It is, however, in this freedom of contracting that the policy must not deprive third-party victims of their rights which would otherwise undermine the effectiveness of the Consolidated Directive. The right of fair compensation for third-party victims is an independent right that terms and conditions agreed by the contracting party cannot restrict. However, the Directive left it to each Member State to extend its compulsory cover in ways it wishes as far as there is third-party cover. In *Candolin v Vahinkovakuutusosakeyhtio Pohjola* [2006],[223] for instance, the driver as well as the passengers were all drunk. Finnish national law allowed insurers to reduce or even exclude a victim's right to compensation where the driver was intoxicated at the time of the accident. However, the CJEU held that the insurer had no right to exclude its liability by relying on its own term or even national law permitting the use of such an exclusion clause as it undermines the aim of the Directive. The insurer in this respect shall not be allowed to avoid liability but restrictively, as in *Csonka*[224] for instance, the Court made it clear that it is the insurer who is to bear the liability, not the Compensatory Body. In the case of *Mr J Allen v Mrs A Mohammed, Allianze Insurance* [2017][225] the insurer tried to deny liability due to a breach of the policy term that the insured was not the driver but someone else with no insurance cover, and this was not permitted under the policy. The CJEU did not permit the use of the exclusion clause due to the existence of this Article.

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[223] *Candolin* (n 218).

[224] Case C−409/11 *Gábor Csonka and Others v Magyar Állam* [2013] ECLI:EU:C:2013:512.

[225] *Mr J Allen v Mrs A Mohammed, Allianz Insurance* [2017] Lloyd's Rep IR 73.

To conclude, under the Consolidated Directive, the rights of third-party victims arise out of the use of a vehicle insured according to the Directive and these rights apply irrespective of contractual terms and conditions agreed between the insurer and the insured person. In other words, the rights of third-party victims cannot be violated by Member States or contracting parties in any circumstance. No exclusions, apart from the one permitted under the Consolidated Directive, are allowed. Finally, in cases where the Directive's provisions intend to confer rights on individuals or create obligations that have to be complied with, both the rights and obligations must be precise and clear so as can be understood by lay people. The principal focus of a statutory review of the law is to examine whether or not the implementation is correct, removing incorrect provisions and improving effectiveness.

Chapter Four: The National Statutory and Extra-Statutory Provisions, a Critique

4.1. Introduction

Prior to the UK's accession to the EU in 1973, there were neither restrictions to limit its power to legislate nor instruction to follow superior laws with regards motor vehicle insurance. Hence, the government and a representative body such as the Motor Insurers' Bureau (MIB) had the largely unfettered right to legislate and to provide regulation to members of the insurance industry. Of course this changed upon the UK's membership of the EU with the acceptance of the superiority of EU law, the surrendering of the UK's sovereignty in relation to the areas of EU competence and the Member States' agreement to fulfil their obligations to give effect to the pillars upon which the EU was established – the free movement principles.

As previously identified, one of the main goals of the Motor Vehicle Insurance Directives (MVID) was to facilitate the free movement of people and goods, which in turn entails free movement of vehicles in the EU. The MVIDs in this respect were an important source of law. They established certain objectives which, if implemented properly, would assist in the realisation of the goal of free movement. Conflict and contradiction of the MVIDs by Member States (as with any source of EU law) are not permitted due to the superiority of EU law and questions of content or scope of the Directives would be determined by the Court of Justice of the European Union (CJEU).

Given the nature of Directives as a source of EU law, requiring as they do transposition within the legal system of the Member States, national laws and/or administrative systems were required to give effect to the MVID. In the UK, this was facilitated primarily by the Road Traffic Act 1988

(RTA88) and two extra-statutory arrangements concluded between the Secretary of State and the MIB – the Uninsured Drivers' Agreement (UDA) and the Untraced Drivers' Agreement (UtDA). In this chapter, the background of the UK's national law (in respect of third-party rights against uninsured and untraced drivers) is outlined and then examined for its consistency and compatibility (the RTA88 and MIB Agreements) with EU law (the MVID).

4.2. Domestic Legislation

The UK's Road Traffic Act 1930, which introduced compulsory motor insurance on a statutory footing since 1930, latterly had to change as a consequence of joining the EU to ensure compliance with the EU legislation. This gave rise to a new Act - the RTA88 and an increasing arrangement between the Secretary of State for Transport with the MIB through a series of agreements to ensure that victims of negligent uninsured and untraced drivers could obtain damages as if those drivers were insured and identified/traced.

4.2.1. The Road Traffic Act 1930

Motor insurance law has developed gradually. From its beginnings there was a fear that imposing certain rules may affect the freedom of conduct and of contracting. However, the necessity that victims of road traffic accidents need protection led to the development of the compensation system as it is known. Under this law, the first compulsory third-party motor insurance cover was imposed, and motor vehicle owners could no longer drive without a minimum of liability insurance cover.[226] The new law aimed to protect victims of those at-fault drivers who might be financially incapable to compensate their victims, and to ensure the compensation is fair for such victims' injuries or loss of

[226] Part Two of the Road Traffic Act 1930.

property. Prior to that, insurance was voluntary (as the case with property insurance) and drivers were not obliged by law to insure their vehicles, but the rise of road accidents required the government to intervene. However, under the RTA30, with its requirement for compulsory insurance, this involved a contractual arrangement between the insurer and the policyholder. This contract was commonly subject to some exclusions of liability through which the insurer would be unavailable to satisfy any claim by a third-party victim. Due to this occurrence, the government at the time created a requirement that the motor insurance industry be subject to an industry-led body regulating their activities. It was also felt appropriate that the members of this industry should each contribute to a central fund which would allow the victims of a motor vehicle accident to claim from this body in the event that the insurer escaped liability (through, for example, the application of a contractual exclusion clause) and the at-fault driver was unable to satisfy a claim / judgment. The body established by the insurance industry was the MIB and the agreement between its members was for a proportion of all the premiums paid by drivers to be given to the MIB to fulfil this role. Hence where an insurer succeeded in avoiding its liability then third-party victims would have another route of compensation. It is available regardless of the legal status of the policy or even the financial circumstances of the driver at fault as compensating victims of any kind of injuries and property damage are guaranteed by common law.

However, this did not mean that problems did not exist in the national law. Where insurers may restrict their liabilities to contracting parties, the result is that third-party victims of motor vehicle accidents are excluded from their right to directly put their claims forward to insurers and thereby prevented from securing a possible settlement. However, third-party victims of motor vehicles accidents may under this law have the right to benefit from insurance policy protection based on subrogated claims, which can be transferred to those victims in turn. That, nevertheless, did not protect them entirely as insurers could still be able to exercise any available contractual defences

against victims in the same way they would deal with the policyholder had insurers have to deal with the direct contracting party.

The importance of the 1930 law then comes from a) The establishment of third-party victims' rights to claim against any loss incurred by negligent drivers from their insurers for the first time. (It is considered to be the main source in this regard and all other provisions are derived from this law); and b) the law has treated third-party victims of road accidents differently by giving them special rights against insurers. For instance, insurers cannot rely on the vehicle's horsepower, the number of passengers and the load and condition of the vehicle in order to avoid liability (see for instance *Gray v Blackmore* [1934][227] on how obligation and liabilities under the national law was interpreted).[228] However, such protections against exclusion clauses were not sufficient as, for instance, the levels of compensation available to victims was not clear. Insurers were able, under this law, to minimise the level of compensation payable to the lowest possible level where the insurer failed to entirely avoid liability. In other words, the aim of the law was undermined by the insurers' freedom to stipulate what contractual terms and conditions regulated the cover (between an insurer and its policyholder) which resulted in great disadvantages to third-party victims of road traffic accidents. Essentially, insurers became the party to decide which claims qualified for compensation as they could rely on breaches of certain conditions present in the insurance policy (and being able to circumvent those explicitly outlawed in the RTA). The restrictions that were imposed on insurers to limit their power to exclude liability for such victims, under this law, achieved very little in protecting third-party victims' rights. The failure may be attributed to the ambiguity of the new rules in this area. A minimum level of compensation, if imposed, to at least compensate third-party victims as if they were insured may have better served the goal of this law.

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[227] *Gray v Blackmore* [1934] 1 KB 95.

[228] The Road Traffic Act 1934.

However, and at later stage, the other crucial step in this respect was the establishment of the MIB. In 1945, insurers registered in the UK agreed to fund a central body to ensure that third-party victims of accidents arising out of the use of vehicles would not be left uncompensated had the vehicle requiring insurance according to Part II of the RTA30 not been so covered. The new body would act as an insurer of last resort as if the driver at fault was at least covered by third-party insurance, even though they were unidentified. This later on, gave rise to the MIB on 14 June 1946.[229] Soon after its establishment, the MIB signed its first Agreement with the government to deal with cases of uninsured drivers and thereafter untraced ones. However, the decision of the government in 1972 to join the European Economic Community (now the EU) meant that the country became legally obliged to abide by new and superior laws and legislation. The changes to the MVID and the decisions of the CJEU led to the required consolidation of national law and the creation of the RTA88.

4.2.2. The Road Traffic Act 1988

The UK's national law meets the requirement of the MVIDs through different sources of statutory and extra-statutory provisions, some of which date back to the RTA30. For instance, s 143 of the RTA88 is derived from the RTA30 which requires motor vehicle owners to ensure that their vehicles are insured according to the law with a minimum of third-party cover before being used on a road or other public place. The government and many national courts consider that collectively and viewed holistically, the national law fulfils the requirements of the MVID,[230] however as will be demonstrated, there are many aspects of the national law which are deficient and breach superior

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[229] Which will be discussed in more detail later in this Chapter.

[230] See the Roadpeace judgment: *RoadPeace v Secretary of State for Transport* [2017] EWHC 2725.

EU laws and norms. The next section identifies specific elements of the RTA88 which provide for the protection of third-party rights.

4.2.2.1. Sections 143 & 145

Under ss 143 & 145 of the RTA88, vehicles' owners are required to ensure that their vehicles have a minimum of third-party cover for any liability against victims for their personal injuries arising out of the use of these vehicles. Earlier sections aimed at protecting third-party victims so that they would not be left without fair compensation. However, if such covers were met by vehicles' owners, which is not always the case, then there would be no need for further discussion. The issue here is that where a driver fails to compensate his victim accordingly, and the protection provided under this law is undermined by the knock-out exclusion clauses contained in the policy terms and conditions, (where an insurer relies on certain exclusions that it has been designed and included in the contract in order to use them later on to avoid liability when an issue arises) then, the claim to have third-party victims' rights protected under this law becomes questionable. In doing so (applying exclusions), third-party victims would be left with no protection as required by the sections above. In other words, even though vehicles' owners obey the law and insure their vehicles accordingly, the legal requirement under this law can be swept out by insurers' knock-out exclusions regardless. Therefore, the law shall not only ensure that there is a minimum of third-party cover in place before operating a vehicle on a road or other public place but to effectively ensure that insurers will not be able to unlawfully avoid it according to their own interests. Nevertheless, even if a minimum of third-party cover was effectively imposed and insurers have no chance whatsoever to exclude, restrict or even limit its duty towards third-party victims' claims, the law will not meet the objective set out by the MVID. The law, and in spite of stating clearly that vehicles in a public place must have third-party motor insurance cover, and cover all liabilities such

as death, injuries, damage to properties caused by the use of the vehicle on a road or any public place, it is still in breach of the MVID as the above sections restrict the scope of compulsory insurance requirement imposed on insurers to only roads or other public places unlike the Directive and the recent case authorities including *MIB v Lewis* [2019].[231]

Sections 145 and 151 of the RTA88 deal with the requirement of the MVIDs on how to meet judgments made in favour of third-party victims of road-traffic accidents that are subject to be legally covered by insurance. Section 145 of the RTA88 describes the nature of cover required under s 143 and its scope. The Section requires cover '*in respect of the death of or bodily injury to any person or damage to property, caused by, or arising out of, the use of a vehicle on a road*.'[232] However, unless the section amended, it is in breach of Article 12(1) of the MVID, where the Directive does not distinguish between victims (such as passenger and employee as this section does), but covers everyone equally. Furthermore, a policy issued under ss 145 and 147 of the RTA88 may cover not liabilities of the policyholder against third-party victims even though it is a compulsory third-party motor insurance policy imposed by the above sections. The Court of Appeal in *EUI Ltd v Bristol Alliance Ltd Partnership* [2012][233] for instance, held that insurers have no right to rely on its interpretation of its policy terms in order to avoid liabilities towards third-party victims of vehicles insured under ss 143 and 145 of the RTA88. However, insurance cover under ss 143 and 145, as they require vehicles' owners to ensure that they are covered according to the law for what they intend the car to be used for, could be invalidated if the type of use is not covered by the policy. For instance, where a driver buys a policy for social and domestic use only, but uses the vehicle for business purposes too. In such a use case, the policy may be held void and the driver is

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[231] *MIB v Lewis* (n 6).

[232] Section 145(3)(a) of the RTA88.

[233] *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

ostensibly uninsured. The type of cover must be stated clearly in the policy or otherwise, the driver is responsible for his action as insurers are not obliged to cover all types of use that a vehicle may capable of. For instance, s 145(4) does not require compulsory third-party cover for many liabilities listed under this section. However, such exclusions breach the MVID to allow un-permitted exclusions. Cases such as that may leave third-party victims to have no other options but to seek their claims under the MIB's Agreements (more detail about this situation and its implications follow).

4.2.2.2. Section 148

Section 148 of the RTA88 is derived from s 12 of the Road Traffic Act 1934 (RTA34). It lists certain exclusions of liability upon which insurers cannot rely in order to avoid liability towards third-party victims when the contracting party is at fault. Such exclusions are ineffective against third-party victims and are confined to the relation between the contracting parties. The exclusions listed in this section may imply that others are allowed (hence they are an exhaustive list rather being illustrative) which may undermine the protective purpose of the MVID. In other words, limiting the number of exclusions may imply that exclusion clauses other than these listed ones under this section, are allowed (see for example *Keeley v Pashen* [2004]).[234] However, the RTA88 at least, in this section complies with the MVID[235] to prevent an insurer from relying on such exclusion clauses to avoid liability. Unfortunately, UK national law does permit other exclusions when they go beyond those listed exclusions, which the MVID prohibits. Nevertheless, the prohibited use of exclusion clauses listed in s 148 against third-party victims is conditional as to have a cover for a liability required under s 145 of the same law (RTA88). In other words, if a

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[234] *Keeley v Pashen* [2004] EWCA Civ 1491.

[235] Article 13.

liability is not required to be covered by a policy as the law requires[236] then the exclusion clauses can be applied against third-party victims, which raise the question of whether such exclusion clauses are completely prohibited under the UK national law. The list of prohibited exclusion clauses under s 148 does not always mean that other exclusions are permitted (not exhaustive) but rather are mentioned due to the frequent use by insurers against third-party victims (the most common exclusion clauses used at that time). In this respect, Article 13 of the MVID does have a list of prohibited exclusion clauses too, but that does not mean that others are permitted (see for instance, *Bernáldez*).[237] The issue with s 148 is that it has not been changed since the RTA34 despite the fact that things such as polices have been changed, which may allow more exclusions to be added if UK courts are not going to adopt the same approach as the CJEU interpretations of Article 13 of the MVID. However, one may argue that the role of the MIB to meet claims that were avoided by insurers may make the issue less important due to its limited use. Such arguments could be true if the MIB properly meets its duty as a Compensatory Body required under Article 10 of the MVID.[238] Sadly, it does not.

Further, the interpretation of s 148(3) of the RTA88 in respect of the exclusion clause where *'the vehicle should be maintained in a roadworthy condition'* can be problematic as to the real meaning of the word '*roadworthy*' where the condition of the vehicle contributes to the accident. For instance, an insurer may deem an insured vehicle as an unroadworthy vehicle due to more passengers being carried in the vehicle concerned than it is intended. It is true that the exclusion is prohibited under the RTA88, which is deemed to meet the MVID's requirement[239] to prohibit

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[236] Section 145(3)(a) of the RTA88 requires all liability to be covered '*in respect of the death of or bodily injury to any person or damage to property, caused by, or arising out of, the use of a vehicle on a road*.'

[237] Case C-129/94 *Criminal proceedings against Rafael Ruiz Bernáldez* ECLI:EU:C:1996:143.

[238] The role of the MIB in respect of avoiding claims will be thoroughly discussed later on in this Chapter.

[239] Article 13.

exclusions in respect of the vehicle safety, it is however, unclear in respect of such a scenario. In other words, whether '*overloading*' a vehicle can amount to it being held unroadworthy so that it falls under the vehicle condition that the law excludes remains uncertain (see for example, *Clarke v National Insurance and Guarantee Corp* [1964][240] and *Monksfield v Vehicle and General Insurance Co* [1971]).[241]

To conclude, exclusion clauses other than listed in s 148 are permitted in the UK especially those that relate to the term '*use*' (see for instance *Bristol Alliance[242] and Sahin*)[243] that is despite the fact that the earlier mentioned exclusion clauses have a clear wording that makes it understandable, it is however, not clear yet as to be exhaustive or not. There are three issues to consider in this respect a) the rights of third-party victims; b) the rights of insurers to limit their liability and c) the lowering of premiums as a consequence (see for example, *Gardner v Moore* [1984][244] as well as *Hardy v Motor Insurers Bureau CA* [1964]).[245] In this respect, the UK courts may need to consider the aims of the national law rather the wording in order to bring the law into line with the MVID.

4.2.2.3. Sections 150, 151 & 152

Section 150 of the RTA88 deems any vehicle's use that does not comply with its contractual agreement as void. For instance, when a driver uses his vehicle for a business purpose while the

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[240] *Clarke v National Insurance and Guarantee Corp* [1964] 1 QB 199.

[241] *Monksfield v Vehicle and General Insurance Company Ltd*. [1971] 1 Lloyd's Rep. 139.

[242] *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

[243] *Sahin v Harvard* [2016] EWCA Civ 1202.

[244] *Gardner v Moore* [1984] AC 548.

[245] *Hardy v Motor Insurers' Bureau* CA [1964] 2 All ER 742.

agreement between him and his insurer is to be for social and pleasure purpose only. Insurers may claim that the Directive's aim is to achieve certain objectives set out for Member States, not to alter the civil law provisions of those Member States. Therefore, and as the non-disclosure and misrepresentation provisions under the RTA88[246] represent the common law of the UK and how it works, it does not then contradict the aim of the Directive to provide protections to citizens of the Community in this regard (although perhaps 151(2) does not comply with the Directive, rather it gives effect to s 151(5)). Therefore, the breach of s 152 is unlike other breaches, which cannot be deemed as a breach of the MVID. However, even though s 152 can be deemed as a 'non-breach of the Directive,' it is still risky in that insurers, under this provision, may impose unfair pre-conditions of cover that can be used later when a claim arises. In *Fidelidade Companhia de Seguros SA v Caisse Suisse De Compensation* [2017][247] for instance, the insurer tried to shift the liability to the compensatory body due to misrepresentation. The CJEU, however, held that such an exclusion is not permitted by the MVID and therefore is not allowed (the only permitted reason for exclusion of an insurer's liability is where the concerned vehicle is stolen). The CJEU clearly stated that such a misrepresentation does not suffice to deem the vehicle uninsured in respect of a claim made by third-party victims.[248] Such an exclusion clause is permitted in the UK (s 152 RTA88), which needs to be removed or otherwise the MVID would be deprived of its effectiveness. In *Wastell v Woodward And Another* [2017][249] the UK High Court dismissed the insurer's argument to exclude its liability due to a breach of the policy terms (here it was a misrepresentation as the vehicle was being used for a business purpose that was not covered by the policy).[250]

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[246] See Part II of the Road Traffic Act 1988 (RTA88 s 152).

[247] *Fidelidade Companhia de Seguros SA v Caisse Suisse De Compensation* (Case 287/16) ECLI:EU:C:2017:575.

[248] Article 1(4) of the Second Directive.

[249] *Wastell v Woodward and Another* [2017] Lloyd's Rep. IR 474.

[250] The court relied on s 145 of the RTA88 to dismiss the validity of the exclusion clause used against the third-party.

Nonetheless, policies issued on or after 6 of April 2013 have been made more difficult for insurers to impose pre-conditions of cover for future use in case of arising claims where the 2012 Act replaced the common law and all other relevant statutory (contracts are no longer governed by the common law). Furthermore, ss 148 and 150 of the RTA88 may offer some sort of assistant to prevent insurers from restricting these liabilities in order to avoid compensation to third-party victims.

In this respect, ss 151 and 152 RTA88 give third-party victims the right to directly recover any outstanding judgment from the insurers' driver at fault, and prevents the insurer from avoiding their responsibilities towards the victim by, for instance, cancelling the contract or claiming it void for any reason. However, third-party victims cannot enforce their rights unless a) the certificate of insurance was obtained under s 147 of the RTA88, b) there is a judgment (s 151(1)) related to that liability (ss 145 and 152(2)) and c) this liability is covered by the policy issued by the insurer that provided the certificate and to be satisfied (s 151(2)). For instance, in *EUI Ltd v Bristol Alliance Ltd Partnership* [2012][251] the driver did not use the vehicle according to his policy agreement. There was no relation between the use of the vehicle and the certificate issued by the insurer (here the insured used the vehicle in an attempt to commit suicide and had insurer known this, no policy would have been sold to him). Furthermore, the insurer's motor policy in this case excluded cover for any damage that arose as a consequence of a deliberate act of the policyholder. That was clearly stated in the policy where an exclusion clause was inserted that deny any responsibly for *'any loss, damage, death or injury arising as a result of a "road rage" incident or* ***deliberate act*** *caused by the insured or any driver insured to drive the car.'* Therefore, the insurer could, under its agreement, claim that it has no liability to satisfy under s 151 RTA88. However, the claimant argued that a

[251] *EUI* (n 243).

proper construction of the national law, alongside with the Directive (insurer obliged to provide cover for any damage) makes the insurer liable to satisfy the claim. Another approach that could have been used by the claimant to hold the insurer liable for the damage is where the decision of *Bernáldez*[252] can be considered as of general application, which would lead, through a *Marleasing*[253] interpretation, for the UK national courts to interpret s 151(2)(a) RTA88 to give effect to the MVIDs. However, an insurer may argue that the claim is not covered by the policy, and therefore no direct right can be brought against them. In this respect, Ward LJ argued that the case, if to be widely interpreted (according to *Bernáldez*), would make the UK national law in breach of the MVIDs as its application in such interpretation would lead to prohibit any exclusions that insurers may use against third-party victims.[254] However, Ward LJ continued that the argument of relying on *Bernáldez*[255] not to permit any exclusion cannot be right as the MVID itself permits certain exclusions permitted against third-party victims. The claim, nevertheless, fell under s 151 due to the type of use that the driver exercised. Furthermore, the real victim in this case, the House of Fraser, was compensated by its property insurer, and as the MVIDs consider a payment made to a victim (regardless of direction that made the payment) as a payment that meets its requirement as far as it was not lesser than the minimum required level, therefore the protective purpose of the MVIDs is not undermined by leaving the victim uncompensated. The issue here is that the case would have negative effects in the future if other courts decided to adopt such approach, which could result in third-party victims being left uncompensated (if no other source is available for them to seek compensation). Furthermore, it makes the law uncertain as to what exclusions clauses can/ not be permitted under the national law.

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[252] *Bernáldez* (n 238).

[253] (Case C-106/89) *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

[254] Subject to the only exclusion clause permitted under the MVID in Article 13.

[255] *Bernáldez* (n 238).

Another dimension to this case is where the court rejected a third-party claim for compensation for reasons to do with '*public policy*' where compensation for illegal acts was prohibited.[256] However, such an exclusion does not always restrict third-party victims' rights for compensation automatically, but where applicable it does. In other words, third-party victims' rights ensured under the RTA88 can be threaten by a '*public policy*' reason (see for instance, *Charlton v Fisher* [2001]).[257] Furthermore, Rix LJ stated that '*deliberate conduct would not come within the meaning of accidents*'[258] and consequently the insurer may not liable for such acts. However, the judge believed that third-party victims' rights should not be affected by such unlawful acts. The question here is whether the claimant (*Bristol Alliance*) would be entitled to compensation had the claim been seen by his Lordship (Rix LJ) or it would be concluded in the same way, which reflects the negative impact of different interpretations on innocent third-party victims' rights.

As Ward LJ stated, in respect of s 151, third-party victims need not only to a) have a driver who has an insurance certificate issued under s 147; b) a judgment against that person obtained (s 151(1)) and c) a judgment in relation to a liability that requires insurance cover (s 145), but to also ensure that d) the lability is covered by the policy terms (s 151(2)(a)). As the last condition is not met in this case, third-party victims are not entitled to compensation. Ward LJ relied on the policy terms as they expressly excluded any damages arising out of deliberate act of the driver. However, liability might not have to be entirely up to an act but also within the policy as well, as far as the policy does not breach the RTA88. Certain exclusion clauses may be permitted due to the need to differentiate

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[256] See *Hardy v Motor Insurers' Bureau* [1964] 2 All ER 742, where Lord Denning M.R stated that '*no person can claim indemnity for his own wilful and culpable crime*.'

[257] *Charlton v Fisher and Anor* [2001] Lloyd's Rep IR 387, where a passenger was deliberately hit in a hotel car park and suffered a serious injury.

[258] ibid.

between the vehicle use as charges vary depending on the type of use. Further, public safety can be a clear rationale behind that. Nevertheless, it is not clear as to why Ward LJ took this approach to permit the exclusion clause of the policy '*deliberately caused damage*.' Is that due to the wording of the policy, and specifically the term used here '*accident*,' which has a wide interpretation that may permit deliberate damage and which, without the insertion of the exclusion clause '*deliberate damage*,' the insurer would be liable for the damage cause to third-party or for something else?

To conclude, it seems unclear as to what terms and exclusion clauses can be permitted and what cannot due to the different approaches adopted by the UK courts as well as the lack of new legislation to replace or clarify this particular issue in the UK national law. However, s 151 RTA88 narrows insurers' liability to claims that are only '*covered by the terms of the policy*,' which may undermine third-party victims' rights to have fair compensation. Another issue in this regard which may be worth considering is that the health condition of the driver and if he was capable to obtain a driving license and to buy a policy. However, this may lead to another issue, which is non-disclosure material where again the insurer is entitled to claim the policy is void as well. Nevertheless, in case of an accident arising of out of the use of an insured vehicle in a public place, a third-party victim can bring their claim directly against the insurer under s 151(5) RTA88 and the insurer is obliged to satisfy the judgment under s 151(2)(a) of the same law once the victims manage to secure a judgment for their injuries, loss or damage.

4.2.2.4. Section 151(4)

This section breaches Article 13 of the MVID where it adopts a different interpretation of the term '*knowledge*.' Under this Act, constructive knowledge or negligent ignorance may amount to being equal to the actual knowledge required under the MVID. Furthermore, the provision has an

additional term that is not mentioned by this Directive - '*unlawfully taken*' which widens the scope of accidents that may fall within this wide concept of knowledge interpretation and which in turn means more third-party victims would be left without fair compensation. It also worth mentioning that there is an extra requirement on a victim who is expected to alight from the vehicle at the point he knew that the vehicle was stolen or had been unlawfully taken if he was unaware that the vehicle was uninsured before starting his ride (*Candolin* [2005]).[259] No such requirements are permitted under the MVID. Furthermore, s 151(5) RTA88 is the statutory duty to satisfy judgments. However, under this section, insurers may have the right to cancel or avoid the policy. An insurer, nonetheless under s 151(4) can cancel the policy and therefore it is no longer liable under s 151(5) as the victim allowed himself voluntarily to be carried in a vehicle involved in accident and he knew or has reason to believe that the vehicle was stolen or had been unlawfully taken. Further, a victim in such a case may become liable for his action where he, for instance, failed to leave the vehicle, where possible, once he knew or had reason to know the vehicle was stolen or unlawfully taken.

4.2.2.5. Section 151(8)

Under s 151(8) RTA88, insurers have the right to recover against a driver who, at the time of the accident, was driving without consent or is not covered by the policy. In other words, insurers can reclaim any judgment that was satisfied by them as a consequence of an action of an uninsured person by a policyholder who was held liable to pay certain amount for an accident he caused. Insurers can recover from the person at fault or from the person insured by a policy where that insured person permitted the use of the vehicle involved in the accident. However, if the liable person has his liability covered by a security then the judgment may be satisfied by that security. Section 151(8) was designed to prevent a passenger, who is the policyholder, from benefiting from

[259] *Candolin* (n 218).

his insurance cover if he was held responsible for an accident by permitting others to drive his insured vehicle. Nonetheless, this section contradicts Article 13 as well as Article 6 of the MVID as the Directive does not allow such exclusions (but only the afore mentioned exclusion above). However, one may argue that s 151(8) RTA88 is somewhat confusing to determine whether the section is based on insurance law or civil liability, and therefore, whether consistency with the MVIDs has been met or not. Nevertheless, the RTA88 is legislation that deals with insurance law and not civil liability therefore the section can be considered to be based on insurance law not civil liability (see for instance, *Lavrador v Companhia de Seguros Fidelidade-Mundial SA* [2012]).[260]

In *Churchill Insurance v Wilkinson and Tracey Evans* [2011][261] Mr Wilkinson, the policyholder, in 2005 permitted his friend to drive his car. He knew that his friend, who was drunk, was uninsured. The car was involved in an accident while it was driven by his friend and caused him (Mr Wilkinson) severe injuries. The court held that under s 151(5) RTA88, Churchill was responsible to compensate Mr Wilkinson with no right to reclaim it back under s 151(8) of the same law. However, the insurer appealed against the judgment. The Court of Appeal referred the case to the Court of Justice of the European Union (CJEU). The CJEU restated what is permitted under Article 2(1) of the Second MVID that the only exclusion that is allowed is where a victim allows himself voluntarily to be carried in stolen vehicle and the insurer can prove that the victim knew that was the case. However, the ruling in *Churchill Insurance v Wilkinson and Tracey Evans* did not seem to have the (perhaps anticipated) forward movement towards making s 151(8) compliant with EU law. In this respect, in *Churchill Insurance Co Ltd v Fitzgerald* [2013][262] the court adopted a new approach and interpreted the national law in line with the MVIDs. It is, however, clear that s 151(8)

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[260] *Lavrador v Companhia de Seguros Fidelidade-Mundial SA* [2012] Lloyd's Rep IR 236.

[261] *Churchill Insurance v Wilkinson and Tracey Evans* [2011] ECR I-00000. 20 at [20].

[262] *Churchill Insurance Co Ltd v Fitzgerald* [2013] 1 Lloyd's Rep IR 137.

RTA88 breaches the MVIDs and therefore shall not be permitted. Article 12(1) of the MVID clearly states that Member States are required to cover all injured passengers subject to Article 13(1) of the same Directive. Furthermore, Waller LJ, for instance, argued that an insurer shall not use exclusion clauses against passengers, although he believed that a total prohibition of the use of exclusions is impossible, and that there should be a wide interpretation of the Directive.

Another issue in this respect is where the victim is at the same time the policyholder and who was held responsible under s 151(8) RTA88 for the payment of compensation. The insurer cannot in the first place deny its responsibilities to compensate a victim because he permitted the wrongdoer to drive without legal cover required under s 151(5). The insurer can, however, go back to the policyholder and recover the money paid as he illegally permitted another person to drive his vehicle. However, in such case the question is if the insurer is entitled to claim the amount paid out to victims from them later on? If so then the claim would be a waste of time and money and the claimant may avoid even reporting such incidents in order to avoid the negative impact on his driving record which may lead to breaches of other legal obligations (such as to report to the police, especially if a victim suffers personal injuries). It may also lead to fake reports as victims may claim that they were hit by untraced drivers. In conclusion, the law may be considered to be a less effective mechanism to guarantee their rights.

The previous argument, which illustrates the deficiency of the UK national law is examined in *Evans*[263] where Evans was insured with Equity to drive her motorcycle as the only driver under her policy. However, in 2004, she gave permission to her friend to drive her motorcycle and she was setting behind him as a passenger. Her friend collided with a lorry. As a result, she suffered severe injuries. The issue was that no-one was allowed to drive the motorcycle but her. Her friend, who

[263] *Evans v Secretary of State for Transport and the MIB* [2003] ECR I-14492.

had insurance in place at the time of accident, had policy terms which did not allow him to drive another motorcycle. Therefore, he was deemed to be an uninsured driver. However, the court held that Evans was entitled to compensation but the insurer was entitled too to reclaim it back from her under s 151(8). The exclusion under s 151(8) which prevents victims of third-parties involved in road traffic accidents from their right to compensation or to compensate victims and claim it back from them, undermines the protective purpose of the MVID to ensure that such victims are protected, and the exclusion shall not be enforced but should be dis-applied as it contradicts Article 12(1) of the MVID. However, the MVID permits insurers in such cases from excluding victims of such accidents from compensation where it could prove that the victim knew that the driver was uninsured. In other words, the RTA88[264] prohibits insurers from avoiding a liability where an insured vehicle been used by an uninsured driver, which meets the requirement of the MVID,[265] and allows third-party victims to direct their claim to the policyholders' insurers regardless. The issue is, however, where the insurer under s 151(8) can claim back their loss from the policyholder who permitted that driver to operate the vehicle.

Such an illegal exclusion clause is examined by the CJEU specifically in *Ruiz Bernaldez* [1996][266] where the court stated that Member States cannot rely on their national laws to deprive third-party victims of their rights. In this case, the insurer denied its responsibility to satisfy the claim as the damage to property was due to driving under the influence of alcohol, which breached the insurance policy. Driving while intoxicated can invalidate the policy and exclude insurers from cover under Spanish law. Therefore, the driver was required to meet the judgment. Nevertheless, the case was later referred to the CJEU to determine the legality of the exclusion. The Court stated that under

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[264] See Part II of the RTA88 s 151 (3).

[265] Article 13(1).

[266] *Bernáldez* (n 238).

Article 2(1) of the Second MVID no exclusion against third-party liability was permitted apart of the one where a passenger voluntarily let himself in a stolen vehicle and the insurer can prove the victim knew that the vehicle was stolen. The question that remains is whether *Bernaldez*[267] can have a wide application so as to apply to s 151(2)(a) RTA88. If yes, then the UK's national law is in breach of the MVID. In spite of the fact that Member States need not harmonise their national laws, it is however true that they are not permitted to undermine the purpose of the MVID. In respect of this case, the UK national law obviously undermines the protective purpose of the MVIDs as it does not only limit the award of compensation but deprives third-party victims of their right of compensation completely. If the exclusion applied in *Bernaldez*,[268] which was an attempt by the insurer to avoid liability was deemed illegal by the European Court, it cannot have a different conclusion by the same Court where another insurer tries to do the same (see as well *Farrell v Whitty* [2007]).[269] Therefore, a victim of a road-traffic accident has the right to benefit from the right conferred on him under the RTA88[270] (unless the right is excluded under the MVID).

Back to the UK judiciary**,** the insurer, in *Delaney*[271] for instance, had obtained that the insurance policy was void due to contractual breach, and therefore, the insurer was free of its obligation to satisfy any claim. Under s 152 RTA88, accidents that involve a crime could be avoided by the insurer on the ground of non-disclosure of a material fact. Insurers may argue that the purpose of the use of the car at that time is to take, for instance, drugs from one place to another (in the course of a crime) that cannot be done without a private car to sell it somewhere else, which is against the

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[267] ibid.

[268] ibid.

[269] *Farrell v Whitty* (n 100).

[270] Section 151(5).

[271] *Delaney v Pickett* (n 93).

normal use of a vehicle (against what the policyholder contracted for). Therefore, the exclusion cannot be deemed as illegal practice. However, in spite of that, it is still an exclusion that does not comply with the general principle of compensation as stated by the MVID. Nevertheless, such an incident can be argued that the finding could be different as to the injuries that the victim suffered as a result of the accident was not due to the use of drugs but due to the driver's negligence. In other words, the victim's claim shall not be denied as his illegal conduct did not lead to the accident. Therefore, the victim shall be entitled to be compensated accordingly. Finally, the exclusion permitted under the RTA88 cannot be taken for face value but rather must be restrictively construed to ensure that the purpose of the MVID is not breached. It may also be interpreted by applying it only to serious crimes and where there is a direct link between the crime and the injury caused by the accident. However, the Court of Appeal dismissed such an application.

4.2.2.6. Section 185(1)

This section of the RTA88 defines a vehicle as *'a mechanically propelled vehicle intended or adapted for use on roads (and other public places)*.' The definition clearly excludes vehicles that are '*intended*' or '*adapted*' for use on private land. Such exclusion meets the requirement of another exclusion of the RTA88[272] where vehicles need to have cover only on a '*road*' or other '*public place*.'[273] However, unlike the UK national law (see *UK Insurance Ltd v Holden* [2016]),[274] the MVID does not distinguish between public and private land as far as a vehicle is used in consistent

[272] See Part II of the Road Traffic Act 1988 (RTA88 s 143 (1) (a)).

[273] The term is defined as any place that the public has access to. See for instance, *Police v Smith* [1976].

[274] See for instance, *UK Insurance Limited v Thomas Holden [*2016] EWHC 264 (QB). In this case, Waksman J rejected the insurer argument to limit its liability to only "*road*", stating that although the RTA88 provides compulsory cover to "*road and other public place that does not mean the policy cannot be more generous*"

with its normal function (see *Vnuk v Zavarovalnica Triglav* [2016]).[275] Finally, *Vnuk*[276] leaves ss 143 and 185 RTA88 in breach of the MVID. The former in regard of '*road or other public place*,' the latter in regard of the phrase '*intended or adapted for use on roads*.' Furthermore, the recent decision of the High Court in *Lewis v Tindale*,[277] as confirmed by the Court of Appeal in *MIB v Lewis* [2019][278] is a clear sign from the UK judiciary that the UK has failed to meet its obligation to bring the law into line with the MVID in respect of the scope of cover.

4.3. Concluding Remarks

The UK's national law (RTA88) and EU Law (MVID) are the regulations that govern insurance policy and other issues related to the use of motor vehicles. However, the requirement of s 143 RTA88 is not the first enactment to require a minimum of third-party victim cover. Such a legal requirement has been in place since 1930. Both national laws have failed to meet the level of protection required by EU Directives, which necessitated extra-statutory provisions and gave arise to the Agreements. Nonetheless, in the case of victims of uninsured drivers, little protection can be achieved through the RTA88 where victims of such cases have the right to directly bring their claims against the insurers of wrongdoers. However, where wrongdoers have no insurance at all or their policy is deemed void, the RTA88 has no provisions to cover such cases but the alternatives such as the Agreements to deal with the situation depending on what legal statues of the wrongdoers when the accidents take place. In other words, the UK's national law (the RTA30 as well as the RTA88) did not provide full protection to third-party victims, and insurers could manage to avoid

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[275] *Vnuk* (n 11).

[276] *Vnuk* (n 11).

[277] *Lewis v Tindale, Motor Insurers' Bureau and Secretary of State for Transport* [2018] EWHC 2376 (QB).

[278] *MIB v Lewis* (n 6).

liabilities (for reasons such as non-disclosure). Further, it was apparent that insurers could also avoid liabilities for misrepresentation. Under both laws, insurers have the right to avoid responsibility and could therefore seek a declaration that the contract is void due to breach of the duty of utmost good faith when presenting the risk. In this respect, insurers may have the right to limit their liability based on the risk covered by the policy as it is not fair to charge a policyholder for pleasure use with the one used for business, as the lower risk is charged at a lower premium, and the policyholder must not lower their payment through misrepresentation. However, such exclusion clauses shall not affect third-party victims and the responsibilities of the insurer.

The government may need to revise the national law and take into account the MVID as their primary source. In other words, to thoroughly study the MVID and base on that a new, and compliant, Act. Furthermore, legislators need to consider the CJEU's interpretation of the MVID, apply the *Marleasing*[279] principle where relevant, in order to give effect to the Directive and avoid contradiction.

4.4. The MIB's Agreements, A Brief History

The MIB, which represents the insurance industry, was established to ensure that innocent third-party victims of road traffic accidents would not be left without access to fair compensation. It contracts with the Secretary of State for Transport on the terms that victims of uninsured and untraced drivers may seek to recover their compensation. Negotiations with the Secretary of State for Transport have resulted in a series of Agreements, the first of which was limited to claims related to uninsured drivers. Later, and after few amendments of the first Agreement, the 1999

[279] *Marleasing* (n 254).

Agreement was signed, which was deemed to be the most comprehensive one at that time. However, although the first Uninsured Driver Agreement was agreed in 1946, the first Agreement to deal with claims of untraced drivers was not agreed until 1969. The Agreement in charge of untraced drivers' claims is the Untraced Drivers' Agreement (UtDA) 2003.

To some extent, the national law in this respect, remained unchallenged until 1973 when the UK joined the European Economic Community. As a consequence, the Agreements, as well as other national law, have superior laws that need to be taken into account to ensure compliance (with, in this respect, the MVIDs). The 1999 Agreement was, after few amendments, replaced. Claims are now brought under the 2015 Agreement (the UDA 2015). The most recent Agreement in respect of untraced drivers' claims is the UtDA 2017. In this regard, the extra-statutory provisions, which is agreed between the Secretary of State for Transport and the MIB (in a series of Agreements) believed (at least from the government and the MIB perspective) to be working into line with the EU requirements as the national law (the RTA88) falls short of (it was deemed alongside with the RTA88 to meet all the Directive requirement). However, such a claim has no evidence to back it up, and whether or not the UK needs to do more to comply with the MVIDs.

4.4.1. The Uninsured Drivers' Agreement 1999

The RTA88 permits exclusions that insurers have used in every possible way to avoid liabilities, which made third-party victims' protection provided by the Act questionable. It is however, expected that the RTA88 falls short in this respect as things evolved rapidly, but nevertheless, the Agreements, which are supposedly, designed to ensure that such victims would not be left without fair compensation, falls short too in coping with what it is designed for. The UDA 1999 is signed by the MIB, which handles the claims as a last resort, and the government (The Secretary of State for

Transport). However, soon after its introduction, it was heavily criticised by practitioners for its ambiguities and difficulties. Barrister Andrew Ritchie for instance, believed that the 1999 Agreement was *'very poorly publicised,... and vicious in its terms.'* Furthermore, Ian Walker, remarked that *'... the continued existence of this agreement is likely to cause problems for claimants and their lawyers*.' Statements such as these demonstrate the quality of the 1999 Agreement as to what extent it provides protection to third-party victims of road traffic accidents.

4.4.1.1. The Scope of the 1999 Agreement

One of the first requirement for victims of uninsured drivers is that the vehicle involved in the accidents, which caused them loss and personal injury, is to fall under the insurance requirement in Pt VI of the RTA88.[280] Claimants therefore, have the right to bring their claims for compensation under this Agreement. Such restriction to this type of vehicles where it includes only the ones to have insurance according to the RTA88 requirement may lead to exclude vehicles that are not required to be insured under this Act (see especially advances to compulsory motor insurance on private land in *Vnuk,*[281] *Andrade*[282] and *Juliana*).[283] Such a restriction contradicts the MVID as there is no equivalent restriction in the Directive. Furthermore, there are certain requirements in respect of policies of insurance where a policy shall satisfy the legal requirement (s 145(5) RTA88). It must be issued by an authorised insurer, an insurer must join the MIB and pay percentage of its premiums towards the central fund (the MIB) in order to be authorised.

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[280] Which was discussed earlier in this chapter.

[281] *Vnuk* (n 11).

[282] Case C−514/16 *Isabel Maria Pinheiro Vieira Rodrigues de Andrade, Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador, Crédito Agrícola Seguros — Companhia de Seguros de Ramos Reais SA, Jorge Oliveira Pinto* [2018] 4 WLR 75, [2017] WLR(D) 788, ECLI:EU:C:2017:908.

[283] Case C-80/17 *Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana Micaela Caetano Juliana* [2018] ECLI:EU:C:2018:661.

4.4.1.2. Exclusions and Limitations of Liability

There are many exclusion clauses that the 1999 Agreement contains which undermine the protective purpose of the MVID. Some of which entirely deprive third-party victims of their right to fair compensation, others partially so. In this respect, claimants suffer because of road traffic accidents, which occur on or after 1 October 1999 are to follow the 1999 Agreement in order to secure compensation. The MIB, as mentioned earlier, refuses to deal with claims that involve '*exempted vehicles*' that are not required to be insured according to the RTA88. A claimant, therefore, cannot bring his claim to the MIB as the MIB excludes such claims under cll 6.1(a) and (b) of the 1999 Agreement, which breaches the victims' rights for compensation of unauthorised users of such vehicles based on exclusions designed by the MIB. The MVID however, does allow derogations but requires EU Member States to take the correct measures to ensure that victims of exempted vehicles are compensated for their loss and injuries, regardless. The MIB, nevertheless, has no mechanism to deal with victims of such vehicles but left it to the authority that its vehicles are derogated to satisfy its claims, which breaches the MVIDs as the permission to derogate certain vehicles is not an unconditional one but to ensure that there is an alternative compensation scheme, which the MIB completely ignore. For instance, cl 6.1(a) of the 1999 Agreement excludes the MIB's liability caused by vehicles belonging to or in the Crown's possession. However, the MIB under this clause still denies any responsibility for loss or injury caused by Crown vehicles (and other derogated vehicles) even though such vehicles were taken and used unlawfully.

Furthermore, cl. 5 of the UDA 1999 imposes a duty on the MIB to satisfy any unsatisfied judgment made against a driver if the driver concerned or his insurer failed to satisfy the judgment regardless

of why he or his insurer failed to do so. However, such duty is restricted and the MIB can deny any liability where

> *(c) A claim by, or for the benefit of, a person ("the beneficiary") other than the person suffering death, injury or damage which is made either: (i) in respect of a cause of action or a judgment which has been assigned to the beneficiary; or (ii) pursuant to a right of subrogation or contractual or other right belonging to the beneficiary*.

However, the MIB may argue that the clause aims to prevent the one who satisfied the claimant's judgment from enforcing the judgment against it (the MIB) (under what is called subrogation). In other words, cl 6.1(c) of the 1999 Agreement excludes any liability of the MIB that may an assignee '*beneficiary*' or anyone other than the victim who may wish to make a claim based on, for instance, subrogation or contractual right to act on behalf of the victim (see for instance what happened to the third-party victim, Bristol Alliance).[284] The exclusion has no root in the common law to refer to, and neither the RTA88 nor the MVID allow it. However, if the judgment was not satisfied within seven days of the day of award, either by the driver at fault or his insurer, then the MIB has an obligation to satisfy the claim and then to reclaim its payment by way of subrogation. Furthermore, under the 1999 Agreement, the MIB is not liable for any claim that involved the commission of a crime. The Agreement clearly states that claims relating to a '*crime exemption*' are excluded, which contradicts the MVID's purpose of protection to third-party victims. Such exclusions are clearly prohibited by the Directive. Unfortunately, the exclusions have been used by the MIB to avoid liability in many cases (see for instance, *Delaney v Secretary of State* (2015)).

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[284] Which was explained in detail earlier in this Chapter.

Finally, under the UDA 1999, the MIB has the right to exclude third-party vehicle damage where at the time of the accident the vehicle concerned was uninsured too and the claimant knew or had reason to believe that was the case. Such an exclusion clause is not permitted under the MVIDs, which means it breaches the protective purpose to ensure that third-party victims are fully compensated.

4.4.1.3. Deductions from Compensation (Subrogated Claims)

The compensatory body has the right to deduction in subrogated claims where a victim has succeeded in securing a payment from a third-party. This is permitted by the MVID to avoid double payments that victims may otherwise be awarded. But nonetheless, the MVID restricts the right of the compensatory body to make deductions and does not permit the use of deductions as a general right where it (the compensatory body) may use it to undermine a victim's right of fair compensation. In *McCall v Poulton & MIB* [2008][285] for instance, the Court of Appeal referred the case to the CJEU to decide on whether or not the UDA 1999 can be interpreted purposively using *Marleasing*.[286] However, the issue was resolved before the CJEU got the chance to decide on it.

In subrogated claims, the MIB under the 1999 Agreement, relies on cl 6.1(c) in order to avoid liability (see for instance *EUI v Bristol Alliance* [2012]).[287] Victims that are not involved in the accidents and who suffered loss are excluded under this clause. It is not clear whether or not there is a breach of the MVID in this regard. However, Article 10 is clear when it comes to the level of compensation to be at least equivalent to those where the claim been made against insurer for

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[285] *McCall v Poulton & MIB* [2008] EWCA Civ 1263.

[286] *Marleasing* (n 254).

[287] *EUI* (n 243).

property damage and personal injuries. Therefore, where the Directive does not clearly permit or prohibit such exclusion, it is clear that the Directive does not permit the compensatory bodies operating under Article 10 (such as the MIB), to prevent victims of their entitlements but to compensate them with at least up to the limit that insurer usually pay for such claims. Insurers are legally obliged to compensate victims for their injuries and property damage and all other expenses that they have experienced as a consequence of an accident - for instance, credit hire cost, legal costs or medication expenses. However, in *EUI*,[288] the damage caused to the third-party was deemed to be out of the scope of the UDA 1999, which meant neither the insurer could be held responsible for the loss due to the exclusion clause that the insurer used to exclude its liability nor the MIB (as last resort) under a subrogated claim. Nevertheless, it became apparent that the UK was in breach of the MVIDs after the judgment in *Evans v Secretary of State for the Environment, Transport and the Regions* [2003].[289] In his judgment Jay J stated that cl. 6(1)(e)(iii) of the UDA 1999 was not compatible with EU law and it is clearly in breach of EU Directive. Furthermore, the MIB breaches the Directive in cl 17 were it allows a deduction from the claimant's entitlement that does not comply with Article 10(1) of the Directive. The unlawful deduction applied by the MIB to the relevant sum where a claimant has been paid compensation in relation to the same accident by any other sources. In other words, cl. 17 of the UDA 1999 enables the MIB to deduct any compensation paid by the claimant's insurer or any other source as far as it was paid in relation to the incident that give rise to it. The inclusion of such a clause undermines the protection purpose of the MVID that the compensatory body shall ensure the minimum level of compensation that the victim entitled to have his claim been made directly to an insurer.

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[288] ibid.

[289] Case C-63/01 *Evans v Secretary of State for the Environment, Transport and the Regions* [2003] ECR I-14447.

In *McCall v Poulton & Ors* [2009],[290] the driver was uninsured therefore the claim had to be dealt with by the MIB, the problem was that the claimants' insurer was not aware that the driver at fault was uninsured. The claimant's insurer paid the victim, on top of his loss for injuries and damaged vehicle, some extra charges incurred for the car hire. When the insurer sought to recover its expenses from the MIB as insurer of last resort, the MIB only paid back the insurer the sum paid for personal injury and damaged vehicle and refused to pay the extra charges, relying on the 1999 Agreement and specifically cl 6(1)(c) where the cover, according to the clause cannot be extended to subrogated claims but to only injuries and property damage. As well, cl 17(1) was considered and its effect was that the MIB can deduct from the sum a claimant is entitled to, any payment he or she received or may receive from third-party. In this regard, and in comparison to the MVID, the 1999 Agreement was in breach of the Directive not because the Directive does not allow subrogation claims but where it allows the subrogation and where it does not. The Directive in this example does not allow subrogation claims in the wide scope as provided for in the 1999 Agreement. However, later on and as a consequence of heavy criticism, the MIB tried through certain amendments to lessen the impact of its failure at this stage. The amendments were limited and does not completely remove the unlawful exclusions but limited to interpretation of some legal terms.

Further in this respect, the driver in *Delaney v Pickett* [2011][291] was discovered with a large quantity of illegal drugs (marijuana) on his possession. From the amount found it was considered by the authorities that this was not for personal use but for supply. According to s 152(2) RTA88, the driver is held to be uninsured where they breach the policy through misrepresentations because the section gives to the insurer the right to declare the policy as void for material non-disclosure. The

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[290] *McCall* (n 287).

[291] *Delaney v Pickett* (n 93).

result is that any case for compensation is governed by the UDA (see *Cameron v Hussain* [2017],[292] where the policy was obtained fraudulently and the insurer successfully obtained a declaration that the policy was void under s 152(2) RTA88). Dealing with the case under the Agreement means that the MIB gets involved. However, the MIB applied cll 6(1)(e)(ii) and (iii), which in turn excluded its liability. The exclusion however, was based on one of the illegal exclusions that the Agreement allows. The exclusion contradicts the MVID when it excludes such cases from liabilities where a passenger knew or had reason to believe that the vehicles involved in accident was used in furtherance of a crime. Nonetheless, the claimant failed to raise such a matter before the court that the exclusion under Cl 6(1)(e)(ii) breaches the MVID and therefore should be disregarded. However, national courts failed also to raise the matter of compliance where the courts shall in such cases raise the issue of compliance with the EU Directive even though claimants failed to do so. National courts are not permitted in the UK to refer to EU law (at least at the time through horizontal direct effect of Directives), but national courts (as part of the UK authority to implement the MVIDs) may (if it wishes) rely on the CJEU in, for instance, *Bernaldez*[293] and *Candolin*[294] to bring the Agreement into line with the MVIDs and declare that the 1999 Agreement, in this regard, is not consistent with the MVID. It is clear that under Article 3 of the MVID, the UK has no discretion to permit such exclusions that deprive third-party victims of road traffic accidents of their rights for fair compensation. The case however, later on, was challenged under a *Francovich*[295] action where the claimant in *Delaney v Secretary of State for Transport* [2014][296] succeeded in his claim and the Court of Appeal held that the exclusion under cl 6(1)(e)(ii) of the UDA 1999 was

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[292] *Cameron v (1) Hussain (2) Liverpool Victoria Insurance Co. Ltd* [2017] UKSC 2017/0115.

[293] *Bernáldez* (n 238).

[294] *Candolin* (n 218).

[295] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR I-5357.

[296] *Delaney v Secretary of State for Transport* [2014] EWHC 1785.

unlawful and resulted in a breach that was sufficiently serious to constitute the State's liability. The unlawful exclusion clause, however, was later removed from the UDA 2015 in the UDA 2017.

4.4.1.4. Burden to Prove the Claimant's Knowledge and Consent

The burden of proving the claimant's knowledge and consent that they knowingly and willingly entered a stolen vehicle or one without insurance as a passenger rests with the MIB (see for example, *Mair v Payne, MIB* [2004]).[297] In order for the MIB to apply an exclusion in this respect, it shall establish that there is actual knowledge of the legal status of the vehicle as well as a consent to ride the vehicle in spite of the fact that the vehicle concerned was uninsured. Under cl 6(1)(e) of the UDA 1999, both requirements are to be satisfied in order for the MIB to exclude its liability.

First, the passenger's knowledge. The UDA 1999 provided for a claimant who '*knew or ought to have known*' that the driver was uninsured. Under cl 6(3) of the UDA 1999, the MIB can establish the claimant's knowledge by, for instance, proving that he is the owner or registered keeper of the vehicle concerned and/or permitted its use. In *Mighell v Reading* [1999][298] the MIB 'proved' the knowledge of the claimant that the driver was uninsured by referring to his employment status (here the driver was unemployed). Further, the claimant must know that the defendant is not allowed to drive under his (the claimant's) policy.

The second**,** about consent, provides that under the UDA 1999, a passenger who voluntarily allowed himself to be carried in the uninsured vehicle concerned is excluded from compensation. The problem occurs where a passenger who was unaware that the driver was uninsured when he let

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[297] *Mair v Payne, MIB* [2004] SLT, 178.

[298] *Mighell v Reading* [1999] Lloyd's Rep IR 30.

himself voluntarily be carried in that vehicle and later on (during the journey) becomes aware of the legal status of the concerned vehicle as the clause states '*... and either before or after commencement (of the journey) he could reasonably be expected to have alighted from it*.' The problem here is that if the claimant wants to let himself out, then the issue arises as the term '*failed to alight*' in cl 6(1)(e) of the UDA 1999 is vague as to when to withdraw consent and what can amount to be withdrawal. The clause also states that '*at the time of the use giving rise to the relevant liability*.' However, in *Pickett v Motor Insurers' Bureau* [2004],[299] for instance, the passenger asked the driver to slow down and let her get out, the driver slowed down which made her believe he was going to stop, which made her unclip the seatbelt to let herself out, but the driver instead of stopping accelerated and the car, as a consequence, overturned causing her severe injury. Then, in such an incident, can that amount to a claim that the victim withdrew her consent when she tried to alight the vehicle? Her claim however was rejected by the court due to other factors, and this matter was not contemplated.

As mentioned throughout this chapter, the MVID allows the exclusion of an uninsured vehicle from the compulsory insurance of the compensatory body in a situation where a passenger entered it voluntarily, and it can be proved that the claimant knew that it was uninsured. Nevertheless, the Directive adopts one position where a passenger gives consent at the beginning when he let himself in the vehicle causing the damage and no reference to a further requirement to argue how shall the victim act if he finds out at later stage as there is no such requirement. Furthermore, the MIB under this clause, and specifically in regard of the criminal use of a vehicle, imposes exclusions that are not permitted by the MVID.

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[299] *Pickett v Motor Insurers' Bureau* [2004] Lloyd's Rep IR 513.

Back to cl 6 of the 1999 Agreement, cl 6(1)(e) does breach the Directive when it permits more exclusion clauses than the MVID allows. There are two permitted exclusions under the Directive while the 1999 Agreement permits four where the claimant knew or ought to have known that

> *(i)The vehicle had been stolen or unlawfully taken (ii) The vehicle was being used without there being in force in relation to its use a contract of insurance complying with Part VI of the 1988 Act. (iii) The vehicle was being used in course or furtherance of a crime. (iv) The vehicle was being used to avoid apprehension.*

In this respect, the MIB clearly stated that claimant who used their vehicles in the furtherance of a crime or to avoid lawful apprehension are not entitled to claim compensation from it. The MIB aims through this exclusion to reject any claim can be made by a passenger where the damage was due to the claimant trying to prevent lawful apprehension (see for instance, *Ashton v Turner* [1981]).[300] Such exclusion undermines passengers rights for compensation protected by the MVID. Under the MVID, insurers can exclude liabilities where they can prove that the claimant who voluntarily let himself in the vehicle and he knew that the vehicle which caused the damages or injuries was stolen (actual knowledge) whereas the 1999 Agreement applies different terminology to meet the requirement of knowledge in order to avoid liability. In *White v White* [2001][301] the House of Lords interpreted the type of knowledge required under clause 6(1)(e) to be actual not constructive. Nonetheless, the issue in this respect exceeds the type of knowledge to extra not permitted terms and exclusions such as 'unlawfully' taken whereas the Directive clearly states 'stolen,' and the use in the course or furtherance of a crime or to escape from or avoidance of lawful apprehension. In

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[300] *Ashton v Turner* [1981] QB 137.

[301] *White v White* (n 128).

Farrell[302] for instance, the CJEU stated clearly that additional restrictions to the cover required under the MVIDs (now Article 3 of the consolidated MVID) is not permitted and EU Member States shall take that into account or otherwise the protective purpose of the MVIDs would be undermined. Furthermore, the ruling of *White v White* [2001][303] has highlighted that the MIB does not only fail to protect victims of road traffic accidents according to the MVID, but does not even follow the principle of the UK common law.

The Directive does not permit such exclusion. It is difficult to understand the relation between the damage caused to a victim and his failure to ensure whether or not the vehicle is insured, which oppose the aim of the Directive. The only route for compensation for such victims is to try to recover from the other driver responsible for the damage. The issue is that, if the responsible driver is unable to satisfy the damage, then the victim would be left without any compensation. Furthermore, the clause does not take into account the reason as to why a victim might fail to have his vehicle insured. Does he, for instance, deliberately intend to breach the law, or his policy cancelled due to unpaid premium on time. Therefore, '*ought to have known*' had to be removed or interpreted to be actual knowledge to ensure compliance with the Directive.

4.4.1.5. Procedural Obstacles to the Process of Claiming

There are certain procedural rules where a victim, who wishes to make a claim, is expected to follow in order to proceed his claim. Failing to do so may result in his application being rejected and therefore a claimant may lose his right to apply again especially where there is time limit for certain claims.

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[302] *Farrell v Whitty* (n 100).

[303] *White v White* (n 128).

4.4.1.6 Victims' Right of Privacy

The MIB requires a claimant to use its form precedent to any claim as a crucial step for his claim to be considered by it (the MIB). Therefore, a claim will not be considered unless and until the claimant uses the MIB's form and gives his consent that the MIB can access his personal information accordingly. The issue here is that the amount and type of information that the MIB demands from the victim to have access to, where the claimant must give consent to disclose his information from his employers, local authority and even from the NHS, cannot be justified only to have his claim processed. Such requirement is also contrary to Article 8 of the European Convention on Human Rights. However, failure to comply may risk the claimants' right to proceed due to a technical breach of the 1999 Agreement.[304] Furthermore, the MIB, under this form, requires the claimant to give his consent that his personal information can be released. In other words, there is no duty of confidentiality to the claimant, which may breach the Civil Procedure Rules 1998 (CPR) too.

Under the MIB's Agreement, a claimant is required to send his relevant documents to the MIB's registered office, which can be made by fax or by post (registered or recorded only). The issue here is that if a claimant sent his documents by first class post he could be held to be in breach of cl 8 and therefore his claim cannot proceed (unlike the normal methods for civil proceedings under CPR Pt 6.).

[304] Clause 7.

4.4.1.7. The MIB's Notice Requirement

The MIB requires claimants to give notice to them as well as to any other relevant insurer within 14 days once they commence proceedings. However, the notice shall only be given after the commencement of the proceedings or otherwise it is not accepted. In *S. Silverton v V Goodall & MIB* [1997][305] the MIB tried to avoid liability due to the claimant's failure to meet the requirement of the proceedings notice by only two days. One may ask what sort of impact can such a short period of time of delay to notify them have on the proceedings that permits the MIB to reject the claim unless the reality is that their aim is to ensure third-party victims are not protected but rather rejected. The case was governed by the UDA 1988. A claimant, however, would face the same consequences under the UDA 1999 if he failed to comply with the required period of time.

The burden to comply with cl 9 of the 1999 Agreement is unjustifiable. For instance, when the clause stipulates that a claimant is required to obtain and provide the MIB with all insurance cover related to the claim such as private healthcare received in connection to the accident, employer's insurance, personal accident cover and so on which contradicts the MVID as there is no such requirement imposed on victims. In other words, it hardens the process of such claim, which contradict the MVIDs principals of effectiveness and equivalence. Furthermore, there is contradiction between cl 9 and s 152(1) RTA88 in terms of providing the MIB with proper notice as required by the Agreement of the proceedings' commencement. Under cl 9(1) of the UDA 1999, the MIB can avoid liability where a claimant fails to properly give notice to the driver's insurer (if identified) with no more that 14 days of the commencement of the proceedings. However, in case of the driver being unidentified or there was no insurer in the first place then a claimant is required to give notice to the MIB. Such restriction cannot be justified. Furthermore, cl 9(2) requires a claimant

[305] *S. Silverton v V Goodall & MIB* [1997] EWCA Civ 1363, [1997] PIQR 451.

to disclose what can be deemed as irrelevant personal information to the claim which breaches both the RTA88 and the CPR at the same time. In other words, cl 9 requires '*proper notice*' with all relevant documents of bring proceeding within time limit of 14 days.[306] However the word 'proper' is left to the MIB's interpretation as what it is and what it is not, which if improperly used may leave third-party victims without compensation.

4.4.1.8. Duty to Obtain the Right Information

The MIB may deny any liability towards a claimant where he fails to obtain the required information from the driver at fault as soon as it is reasonably practicable. The driver at fault, in turn, is required to provide all the necessary information requested by the victim according to the RTA88. If, for any reason, the victim was unable to obtain the information required by the MIB then he must report that to the police using reasonable effort. The clause may undermine s 154 RTA88 by depriving or limiting the chance for victims of road traffic accidents to secure fair compensation. However, the issue with this clause is that even if a victim requested the required information from the driver accordingly, and later on it appeared that the driver at fault provided false information that he was legally insured but in fact he is not, the MIB still believes that the victim failed to act accordingly (to report to the police) even though the victim at that time believes that he fulfilled his obligation according to the law and therefore no need to report to the police as the second requirement is required only if the first one was not met. In *Shapoor v Promo Designs & MIB* (2009)[307] for instance, the MIB tried to rely on the 1999 Agreement[308] to avoid its liability due to a failure to report the accident to the police as required. The issue however, arose where the defendant

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[306] Which is different from the requirement of s 152 RTA88.

[307] Unreported case taken from Bevan (n 185).

[308] Clause 13.

provided false information which prevented the claimant from reporting the accident to the police believing that he has obtained the information required accordingly, but when later on it transpired that the information was wrong, it was too late for him to report it to the police. The MIB interpreted that as a failure to either obtain the information or to report to the police. However, the court held that the MIB requirement to avoid its responsibility contradicts the MVIDs. Furthermore, the court held that cl 13(1) does not apply where the other party in not insured. Nevertheless, and although it is understandable that the MIB's aim of this clause is to prompt victims to point out the insurer of the driver at fault, if there is any, so their claim can be sought directly, or at least identify the driver so that if he cannot satisfy the judgement then the MIB will satisfy it and reclaim it back from the driver. However, such requirements may jeopardise innocent third-party victims' right to secure the right compensation failing to comply with it due to some factor such as misleading information provided by the driver at fault or just because the victim were unable to request it due to some injuries or any other factors out of the victims control.

4.4.1.9. The Terrorism Exclusion

The terrorism exclusion (a feature of the UDA 2015 until being reversed in the UDA 2015 (as amended) contradicted the MVID as it (the Directive) permits exclusion clauses only where a claimant, voluntarily, allowed himself in an uninsured or stolen vehicle and the defendant can prove that he knew that was the case. However, using a vehicle in the cause of terror cannot be deemed as a normal use of a vehicle. In such cases (as a terror motive) the insurer would not have granted the insured a policy had it been clear to them that the insured was going to attempt to or would have committed a crime. Furthermore, as there is no legal obligation on insurers to provide all types of cover, it therefore cannot be responsible for such abnormal use of a vehicle. The exclusion has been removed under the new amendments (the new amendments will be thoroughly examined later on in

this chapter). Unfortunately, there is no clear explanation as to why innocent third-party victims of such action were (legally) excluded as the MIB and the government claim, it would have been applicable to incidences occurring before the amendment, but it has now been changed (although interestingly never deemed as unlawful as it was not challenged in the courts in a direct action – it was an aspect of the broader *Roadpeace*[309] action).

4.4.1.10. Concluding Remarks

The Agreement seems intentionally designed to be inferior to statutory and common law rights so that insurers, with their representative (the MIB), can profit from the included exclusions, restrictions and limitations for its own interest. There is a real concern of whether or not the UDA 1999 is fit for purpose as it is not straightforward but highly misleading in that it requires an expert in this field to, perhaps, be able to deal with it and avoid the tricks designed by the MIB. The 1999 Agreement is designed by experts often using mysterious terminology and full of difficult terms - not only for lay people but for specialists too. Its definitions and the terms used in exclusion clauses are vague and include deliberate choices of words that are unnecessary to achieving clarity. The type of conditions required prior to any claim cannot be deemed to serve other than the MIB's narrow interest to avoid more claims fall within its liability, which arises doubts about its title to be called 'a compensatory scheme for victims of uninsured drivers' required under Article 10 of the MVID.

[309] *Roadpeace* (n 231).

4.4.2. The Uninsured Drivers' Agreement 2015

4.4.2.1. Introduction

All incidents that take place on or after the 1 August 2015 are governed by this Agreement, those occurring prior to this date are governed by the 1999 Agreement. However, the purpose of the 2015 Agreement (in addition to meet the requirements of the MVID) was to overcome the obstacles and problems in compatibility that were deemed to hinder third-party victims of road traffic accidents from securing the right compensation for their loss and personal injury. Unfortunately, the 2015 Agreement failed as well to provide the required protection required under the MVID and cannot be deemed as a particularly positive step forwards but, with some exceptions, a continuation of the problems which beset the 1999 Agreement. It, for instance, unfairly burdens victims with procedural rules that victims in most cases cannot satisfy, and which if not satisfied accordingly, permits the MIB to immediately reject claims. Such rules serve not the purpose of the Agreement to protect third-party victims' rights but the interest of the MIB to avoid liabilities where possible. The UDA 2015, however, did remove many of worst offending of these rules (procedural rules required under the 1999 Agreement) in order to make it easier for victims to claim through the MIB. Nonetheless, the forward movement towards making the procedural rules more applicable was (in some cases) conditional in that the MIB can require more information to be presented - where reasonably necessary. The word 'reasonably' is not defined or explained anywhere in the Agreement and it has been left to the MIB to use it when it serves its interest. Furthermore, the 2015 Agreement has not only failed to fix the previous breaches in previous Agreements but has introduced new breaches that cannot be deemed to serve other than the MIB's narrow agenda, which will be discussed later in this chapter.

The author will, in this part of the study, present some of the most important breaches of third-party victims' rights under the UDA 2015 when compared with the MVID, which reflects the fact that there is no a real intention of the MIB and the Secretary of State for Transport to comply with the EU demand (by working consistently with the MVID) to protect third-party victims' rights of road traffic accidents inflicted on them by uninsured drivers.

4.4.2.2. Exclusions to Compensation

The MIB, under the UDA 2015 as with the previous incarnations, is not liable for any claim arising out of the use of a vehicle that is not required to be insured under Pt VI of the RTA88.[310] Furthermore, the accidents shall take place on a road or public place. The restrictions imposed under this Agreement only cover vehicles falling within the scope of the RTA88 and may leave victims of other types of vehicle uncompensated. These contradict the purpose of the MVID to ensure that victims of accidents arising out of the use of a vehicle shall not be left without fair compensation. Furthermore, the restriction of where the accidents take place is a clear breach of the MVID, especially after the *Vnuk*[311] judgment (see Chapter Five for further discussion). The MIB, however, was chosen to fill in the gap (through its Agreement with the government) where the RTA88 falls short, but when the MIB relies on the same Acts to avoid its liabilities towards third-party victims of road traffic accidents instead of filling in for deficiencies in the Act, doubts are raised as to whether the MIB is operating in good faith to meet its duties to bring the law into line with the MVIDs. In other words, the MIB should exist to overcome the drawbacks of the RTAs and

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[310] See Part II of the Road Traffic Act 1988 (RTA88 s 145).

[311] *Vnuk* (n 11).

ensure that third-party victims are not left uncompensated rather than seeking to rely on the RTAs to exclude vehicles from its scope and thereby its liabilities.

4.4.2.3. Compensation and Deductions

The MIB can lawfully, under cl 6 of the UDA 2015, avoid liability towards a victim of an uninsured driver or apply deductions to compensation as to what he or she is entitled to have had the driver been insured and the claim were brought against the insurer directly. The clause, however, is not a new breach of victims' rights for compensation but it seems to have be taken from a previous clause in the 1999 Agreement. Nonetheless, the scope of cl 17 of the 1999 Agreement seems to be widened under the 2015 Agreement. The clause, however, may be intended to motivate victims to make efforts to seek their compensation through insurers directly. The clause seems to be a sort of penalty that will be applied on victims' failure to review any other source of recovery before using the MIB. Nevertheless, its duty (the MIB) is to ensure that third-party victims of road traffic accidents are not left uncompensated and are not penalised by bringing their claim for compensation through this route. Therefore, cl 6 of the 2015 Agreement unjustly treats third-party victims which undermines the purpose of the MVID as it does deprive victims of what they are entitled to (the clause applies to any payment made in regard of the same accident the victim claims from the MIB).

4.4.2.4. Derogation, No Insurance Requirement

EU Member States are required to ensure that civil liability arising out of the use of a vehicle is covered by insurance. The problem in regard to UK insurance law is that the liability covered by the law does not include all claims but only those where insurance cover is needed, which means if loss and injury occurs as a consequence of an accident where there is no legal requirement for the

vehicle to be insured under the RTA88,[312] then the MIB (under its Agreements) is not liable for any loss in such accidents. Such a restriction may lead one to question the legal position of local authorities and the National Health Service's vehicles as to whether or not they can be deemed to meet the requirement of EU law as the MIB clearly denies any responsibility in such cases but leaves those to be dealt with by bodies directly. However, the body/ies may meet all legal requirements and provide fair compensation in case of injury and loss occurring as a consequence of the use of such vehicles as such vehicles are not expected to be driven without insurance cover or to deny responsibilities. The problem, however, may arise when a driver of such vehicle allows an unauthorised person to drive one of the exempted vehicles and the body denied any responsibilities. Then, does the victim of such derogated vehicles have an alternative route through which to seek compensation? If not, victims of such incidents are left without compensation which means there is a clear breach of the MVID (no one left without fair compensation). Bearing in mind that the role of the MIB is to intervene where victims cannot secure a judgment for their loss or injury, cl 5 of the UDA 2015 allows the MIB to avoid its liability to compensate a victim of an uninsured vehicle.

4.4.2.5. The Infamous Crime Exemption and Proof of Knowledge

The 'crime exemption' which appeared in the original UDA 2015 was one of the exclusions that contradict the MVID and had been used by the MIB to avoid liability in such cases (see for instance, *Delaney v Secretary of State* [2015].[313] However, the clause has been removed now from the amended UDA 2015. Nevertheless, although it is a step forward that can be counted for the 2015 Agreement, the Agreement is still a source of uncertainty and does not fully comply with the

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[312] See Part II of the Road Traffic Act 1988 (RTA88 s 145).

[313] *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172.

MVID in this respect - especially when it comes to knowledge. The Directive[314] allows an exclusion from compulsory insurance cover on the knowledge of the victim that he was being driven in a vehicle to be used in the commission of a crime. The burden of proof of knowledge rests with the MIB and not on victims, according to the MVID. It is, however, the proof required under the Agreement in order for the MIB to discharge its duty and exclude liability which must be supported by evidence and not by assumption or perception. The UDA 2015 for instance, in this regard (knowledge) presumes that the claimant is aware of his actions and has knowledge that shifts the burden of proof from the MIB to the claimant to prove the opposite. The interpretation of the word '*knowledge*' under this Agreement is used to reflect the definition stated in the RTA88, not the MVID, which means that it is not in favour of claimants and a clear breach of the MVID. However, in *White v White* [2001],[315] the term '*actual knowledge*' was interpreted by the House of Lords to mean a purposeful 'turning of a blind eye' and not to checking whether or not the vehicle was insured according to the law. However, the new interpretation of the House of Lords did not bring the exemption in line with the Directive and the need for a new clear straight-forward definition, with distinctive lines to be introduced so lay people can in advance know their legal position, remains to be met.

Under the UDA 2015, the MIB excludes vehicle damage where at the time of the damage the vehicle concerned was uninsured and the claimant knew or had reason to believe that was the case. However, in terms of knowledge, the UDA 2015 adopts a different version '*had reason to believe*' instead of the one used under the UDA 1999 '*ought to have known*.' Furthermore, under the UDA 2015, the MIB's liability is excluded where the victim let himself voluntarily in a stolen or unlawfully taken vehicle and the MIB can prove that the victim knew or had reason to believe that

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[314] Article 10(2).

[315] *White v White* (n 128).

was the case. The new phraseology in the UDA 2015 does not seem to reflect a real intention to change the law for the better, as the MIB and the Minister for Transport presume that the claimant should have knowledge in all such instances regardless of the facts or what the MVID states. The new wording does not reflect the Directive's requirement of actual knowledge, although it may be considered as an improvement and better than the one previously used in the UDA 1999. Furthermore, the phrase '*unlawfully taken*' breaches the protective purpose of the MVID as it may widen the scope of interpretation to allow more claims to be rejected under this Agreement. In addition, the MIB under the UDA 2015 has the right to act as an insurer to recover any payment paid in compensation under s 151(8) RTA88. The issue here is that if the MIB is permitted to claim-back its compensation, there is little point for a victim to seek this route of compensation. Such unlawful practice may lead victims of such incidents to break the law and avoid reporting their accidents (a legal requirement). In other words, the MIB uses this clause to prevent claimants, that their entitlements were claimed back by their insurers (where insurers retrieve its payment) to recover their loss from the MIB. The issue here is that the MIB is a last resort compensatory body as it defines itself and applicable further routes for the victims to seek. In spite of that, the MIB still denies victims of their entitlement that they would be awarded had their claims been dealt directly against an insurer.

4.4.2.6. The Terrorism Exclusion

The UDA 2015 does not differentiate between the use of motor vehicle for terrorism (use the vehicle as a weapon) and other acts which can be deemed as a terror attack. The Agreement should not permit such wide interpretation of the exclusion just because it serves the MIB's own interests. However, there is little detail in the UDA 2015 in terms of the terrorism exclusion. The clause which enables the exclusion relies on other sources to define what an act of terrorism means. The

exclusion clause states that there is no liability that can be brought against the MIB where a claim or part of a claim was due to an act of terrorism, as described in s 1 of the terrorism Act 2000. It seems the MIB and the Ministry for Transport preferred not to bother themselves in defining what can and what cannot be deemed terrorism acts as far as there is a definition which meets their needs. The definition, however, has been used in previous Agreements and is wide enough to cover any abnormal use of a vehicle. In this respect, the MIB may claim that in such cases a vehicle cannot be deemed as a vehicle, not only under national law but under the MVID too. Therefore, there is no breach of the Directive. Furthermore, the Directive stipulates that for an accident to fall within its scope to arise out of a 'normal use of a vehicle,' which means once a vehicle is being used as a weapon or a car-bomb for instance, it does not fall anymore within the definition of a vehicle. It is instead a weapon. As such, the MIB in this respect has the right to exclude such acts of terror of its liability.

The problem here is that the MIB went further, and unreasonably necessary, to widen the scope of its exclusion from liability where a vehicle has been used in course of an act of terror. EU law had been clear on this since the *Vnuk*[316] ruling in 2014. Cars required insurance when used in their normal State. Outside of this, there is no legal requirement for insurance to be held and the MIB could have made a convincing argument that it should be held responsible when a vehicle has been used to commit an act of terror. The main issue with the definition provided in the 2015 UDA is the use of the broad terminology adopted in s 1 Terrorism Act 2000. This is an all-encompassing definition which introduces a political element and which, as Marson and Ferris have discussed, results in a variety of situations where the MIB can attempt to escape liability. The exclusion, nevertheless, is neither clearly permitted nor prohibited by the EU but it breaches the protective

[316] *Vnuk* (n 11).

purpose of the Directive to ensure that third-party victims will not be left uncompensated. Therefore, cl 9 is unlawful and contributes to uncertainty in the area.

4.4.2.7. The Right to Appeal (Arbitration)

The role of the MIB to investigate and decide whether or not to offer an award can be deemed as occupying the role of a court and not an insurer of last resort (see *Evans v Secretary of State for Transport and the MIB* [2003]).[317] However, if an applicant failed to secure an award or was not satisfied with the MIB award, he then can appeal to an arbitrator based on the information provided for the refusal. The MIB, under the UDA 2015, has the right to determine whether or not to issue an award based on, for instance, what it (the MIB) calls failing to proceed according to the MIB rules (or as required by it). However, there are no such requirements that may lead to exclude claims under the MVID or even the RTA88, which makes it unlawful as it opposes the spirit of the Directive to ensure that third-party victims' rights are protected.

Clause 17 UDA 2015 is another area of dispute where a claimant cannot or fails to meet the MIB's requirements and subsequently the MIB refuses to proceed with his claim. The unresolved dispute has another single chance to be remedied where a claimant may refer his claim to an arbitrator who is usually appointed by the Secretary of State. However, the Secretary of State appoints arbitrators based on either side of the dispute request. The MIB has a procedure to follow where it (the MIB) has to put in writing to the appointed arbitrator, as well as to the claimant involved, the reasons behind the referral and their opinion about the dispute. The claimant then has, in turn, 28 days to write back to the MIB of his comments and what he might think worth mentioning in the dispute. A copy of this is then sent to the appointed arbitrator. The arbitrator, then, and only based on the MIB

317 *Evans* (n 264).

and the claimant's written submissions, gives the decision. The decision of the arbitrator is final and cannot be appealed by either party. In other words, the claimant, in such cases, has no option but to seek compensation through the MIB as a last resort as he could neither succeed to secure compensation directly against the wrongdoer nor could he do so through an insurer or the MIB. The problem here is that the arbitration process lacks any additional checks as no further appeal is allowed. The problems are compounded by a lack of cross or direct examination of witnesses as the whole case is based on written submissions which may instil an element of doubt as to the efficacy of the process of justice to third-party victims of road traffic accidents. Furthermore, there is no indication that an arbitrator is free to refer to or consider an alternative legal source such as the MVID or the judgments of the CJEU, which may breach the legal certainty of the law as well.

4.4.2.8. Article 75

Article 75 is found in the MIB's Articles of Association, agreed between the MIB and its members. It aims to meet the requirement of Article 11 of the MVID to ensure that there is in place a mechanism where successful claims can be met without unnecessary delay. The article reflects the Directive's requirement that insurers are obliged to deal with claims arising out of the use of a vehicle insured by it. In other words, a claim that was considered to be void by an insurer due to, for instance, misrepresentation or fraud, and consequently must be dealt under the uninsured Agreement, is handled by the insurer under Article 75 (usually under s 151 RTA88)[318] even if the policy, under the RTA88 is declared void.[319] The aim is that of reducing costs and dealing with such claims effectively. One may ask, if the insurer is going to deal with the claim in either way, what is the point of avoiding it in the first place. Insurers in such cases, however, use this article only if they

[318] No legal duty (statute and contract) that oblige insurers to satisfy any payment as such liability becomes void.

[319] Section 152.

believe that meeting liability is more beneficial for them under the MIB Agreements terms rather than their own policy as insurers. If a claim falls out of the Agreement's scope of cover, an insurer in such a case will not be required by the MIB to act as an agent under Article 75 (to, for instance, prevent the claimant from a subrogated claim), which encourages insurers to avoid liability and act as an agent of the MIB - especially where the damage can be of a great value as was the case in *Bristol Alliance v Williams* [2011]).[320] An insurer acting on behalf of the MIB will have the right to recover its payments from the MIB, but if an insurer deals directly without reference to this article then it (the insurer) would have no right to recover its payments from the MIB. In respect of the procedural rules for such claims, there is no differences to the claim, under this article, from those sought through the MIB. However, the article only applies to claims arising out of the use of vehicle insured according to Pt VI of the RTA88. Thereby, they are subject to the MIB's Agreements. Furthermore, under this article, the MIB can satisfy any claim falling within the scope of this article by itself and then it may recover its expenses from the insurer in charge of the claim had the article not been applied.

To conclude, the article is used by insurers and the MIB to allocate claims that were considered void by insurers due to contractual breaches such as fraud, non-disclosure or misrepresentation. Article 75(2)(a)(iii) does cover claims where vehicles were used not in accordance of the terms of the policy. The issue here is that the use of this article may give insurers a tool to use exclusion clauses to avoid liability, but to comply with the legal requirements of meeting judgments as an agent of the MIB, but on less favourable terms than are available in the contract itself. Further, it gives insurers the right to choose what to cover and what not to cover, based on their interest rather

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[320] *Bristol Alliance Ltd Partnership v Williams and another* [2011] EWHC 1657 (QB). In this case Ward LJ stated that '*one way or another the objective of the Directives, which seek to ensure that there is some compensation for losses caused by motor vehicles, is satisfied*.'

than on mutual interest. In *EUI*,[321] Article 75 was used by the insurer to avoid its liabilities towards third-party victims stating that where a driver at fault breaches a condition of the policy the insurer has the right to claim the policy as void and treat the case as a claim of an uninsured vehicle that should be brought before the MIB. The problem in such cases is that the MIB does not provide the right compensation up to the level that victims are entitled to have had the claim been brought before the driver's insurer. When considering the article is in conformity with the MVID, it breaches the Directive purposive protection as to the level of compensation, which is not equivalent to the ones brought before insurers. Nevertheless, no different procedures are applied under this article (see for example, *Mighell v Reading,*[322] *Evans v Motor Insurers' Bureau*,[323] and *White v White*).[324] Finally, the legality of this Article is yet to be challenged.

4.4.2.9. Concluding Remarks

The aim of national law in this respect is to ensure that third-party victims can bring their claim against the policyholders' insurer directly. However, if the driver was uninsured or untraced then victims cannot rely on the RTA88 anymore but have to seek a remedy through the extra-statutory provisions. These extra-statutory provisions were enacted to satisfy the needs required by the EU Directives through the MIB. Although the UK has agreed to the supremacy of the EU when it joined in 1973, it has been reluctant to fully implement the minimum standard of protection to innocent third-party victims of motor vehicle accidents as stated in the MVIDs. The 2015 Agreement failed and continues to fail (according to the amended UDA) to provide the required

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[321] *EUI* (n 243).

[322] *Mighell* (n 300).

[323] *Evans* (n 264).

[324] *White v White* (n 128).

level of protection required under the MVID (with some exceptions in comparison to the 1999 Agreement). This Agreement, for instance, unfairly burdens victims with procedural rules that in most cases they cannot satisfy, and which if not satisfied accordingly allows the MIB to reject a claim on this basis. The UDA 2015, however, removed some of the more unfair rules (procedural rules required under the 1999 Agreement) and made it, to some extent, easier for victims to claim and recover compensation through the MIB. Therefore, as an Agreement enacted in order to comply with the MVID it must be interpreted purposively with the Directive. Furthermore, it is part of the UK's national law and therefore its civil law, which means national courts have the right to apply the principle of the *Marleasing*,[325] or otherwise the alternative will be *Francovich* action or judicial review to bring wrong to right. The author further argues later in this thesis that a possible more effective remedy would be achieved through an application to have the offending aspects of the RTA88, UDA and UtDA disapplied as breaching EU law.

[325] *Marleasing* (n 254).

4.5. The MIB

4.5.1. Introduction

A few years after the RTA30 was passed, it transpired that the law needed an urgent review, which was undertaken by the Cassel Committee in 1937. The review discovered areas where the law was deficient and, amongst these, recommended that a central fund be established which would help victims of uninsured drivers to recover damages for their loss and personal injury. Following the recommendation, the government and the insurance industry agreed in 1945 to create the so-called Motor Insurers' Bureau (MIB) to be the central guarantee fund for this purpose. Nevertheless, although the MIB was created in 1946, it only became effective in 1969.

4.5.2. The MIB's Scope of Liability

The MIB cannot be held liable to satisfy claims nor indeed involve itself in disputes unless a) the driver at fault was uninsured or untraced; b) there is an insurance requirement under Pt VI of the RTA88; c) the driver was at fault (and negligent, see *Streeter v Hughes, MIB* [2013]);[326] and d) the MIB's procedural rules were met. In other words, claims that can be considered by the MIB are restricted to the ones which fall under its Agreements. Therefore, where an accident occurs as a result of the use of a vehicle which is not required to be insured under Part VI of the RTA88 for instance, it is not the MIB's responsibly to provide compensation in relation to it. Section 145 RTA88 restricts insurers as well as the MIB's scope of liabilities to the use of a vehicle. Insured according to Part VI of the RTA88 means the vehicle operates on a road, which explicitly excludes a vehicle that does not require cover or it operates on any other place that does not fall under the

[326] *Streeter v Hughes, MIB* [2013] EWHC 2841.

definition of a road, which unlawfully excludes accidents occurring on private land and breaches the MVID (see *Vnuk*).[327] Relatively, there are many minor requirements that are imposed by the MIB as well as insurers that could lead to avoidance of any claim that does not comply with its requirements even though it fails within its scope, most of which are administrative or procedural breaches which compromise the efficacy of the MVID and the RTA88. However, where the MIB could be potentially responsible to satisfy a judgment of a claim, it has the right to join the parties to that claim (see for instance, *Gurtner v Circuit* [1968]).[328]

To conclude, the MIB' scope of liability is of a great importance in this respect as its exclusion clauses are much broader than those allowed of insurers and as the MIB is the insurer of last resort, there exists no further back up for third-party victims. Therefore, the scope of cover must be in line with the MVID to ensure consistency where third-party victims' rights are to be protected.

4.5.2.1. The Role of the MIB

According to Article 10 of the MVID, the national compensatory body (the MIB in the case of the UK) is responsible for any claim where a vehicle is involved in a road traffic accident and in which the driver cannot be identified or has no insurance in place[329] at the time of the accident.

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[327] *Vnuk* (n 11).

[328] *Gurtner* (n 167).

[329] Required under Article 3 of the MVID.

4.5.2.2. Is it Fit for Purpose?

The question of whether or not the MIB is fit for purpose as a compensatory body to satisfy the requirement of Article 10 of the MVID to ensure that victims of uninsured and untraced drivers would not be left without fair compensation is crucial in determining whether or not the UK has fulfilled its obligations towards the EU.

The shortfall in the compensatory system for victims of road traffic accidents, especially where no driver can be held responsible or is able to satisfy judgments, led to the creation of the MIB. The MIB was established to overcome the shortfall in the compensatory mechanism for compensation as mentioned earlier, but this designation is, however, somewhat misleading. The MIB is keen to, where possible, avoid or minimise its liability. Its Agreements with the Secretary of State are full of exceptions to deliver its duty that serve nothing but its own interests.[330] A claim under the MIB's Agreements is not equal in compensation to a direct claim against an insurer, nor does it even meet the requirements of the MVID. These breach the EU principles of effectiveness and equivalence. The MIB may argue that it is not required to pay the same level of compensation as insurers do, it is nevertheless under an obligation to meet the MVID's requirement. The MIB may claim that the MVID does not require one level of cover and that it permits differences among Member States. However, although it is true that the MVID does not impose specific rules in this respect, it does require Member States to ensure that victims of road traffic accidents are compensated at least up to the minimum level of compensation that a victim of an insured person is entitled to. Hence the equivalence of the rights of victims within Member States and not between Member States. It is not a permission for Member States to minimise lability to levels that may undermine the protective purpose of the MVID. Nevertheless, EU legislators may also need to consider the negative

[330] The exclusion clauses permitted under the MIB's Agreements are discussed in detail earlier in this chapter.

consequences of Member States' failures to give effect to the MVIDs as such failures mean that the protective purpose of the Directive is not achieved. In other words, if the required body under Article 10 (such as the MIB) does not serve the purpose for which it is established, then the State shall be held to be in a breach of its obligations towards the EU.

4.5.2.3. Legal Status, Insurer of Last Resort and Emanation of the State

The MIB had maintained that it could not be considered as an emanation of State. As it is a private party that does not satisfy the criteria required under *Foster*,[331] and that its only relationship with the State was based on an Agreement which could be terminated with one years' notice, it was not an emanation. This is important as were the MIB to be held an emanation of the State, it would then be subject to the vertical direct effect of Directives, such as the MVID, and this would give claimants a direct cause for using the MVID in national courts (the worst effects of the UDA, UtDA and even the RTA88 could be minimised, if not bypassed entirely). Most recently in *Lewis v Tindale* [2019],[332] the Court of Appeal held the MIB as an emanation of the State, and confirmed that the MVID can have direct effect against the it.

It is a crucial factor that has a major impact on the processes followed and decisions made by national courts for claims made by victims of uninsured and untraced drivers to know whether or not the chosen body under Article 10 of the MVID could be held to be an emanation of State. Such claims can refer to the Directive directly if the compensatory body were to be held as an emanation of State, while it is not possible for victims of road traffic accidents to use the Directive horizontally (against, for instance, a private company). In the UK, there were several cases where the status of

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[331] *Foster v British Gas* (C-188/89) ECLI:EU:C:1990:313.

[332] *Lewis v Tindale* (n 278).

the MIB was raised and the result was a denial of its status as an emanation of State, but the designation of other compensatory bodies in other Member States led to a different conclusion. For example, in *Byrne v The Secretary of State and the MIB* [2007][333] the High Court refused the notion that the MIB was an emanation of State. Nonetheless, the Irish High Court in *Farrell v Whitty and the MIBI* [2008][334] concluded that the Irish Bureau, the MIB for Ireland, was an emanation of State. Evidently it took over ten years later for national law to arrive at the same conclusion, and this came following the Brexit decision where its influence may be less relevant.

4.5.2.4. State Service, State Power and State Control but Not an Emanation of State

The MIB's role and responsibility required under Article 10 of the MVID is a States' role and responsibility in the first place. However, the UK government agreed with the MIB to transfer it (the service) to it (the MIB). In other words, the Directive requirement is directed to the State, with wide discretion, and the UK government has chosen to delegate it to the MIB. The delegation entails especial powers to support the MIB to fulfil its duty accordingly, which the government has indirect control over by, for instance, imposing certain conditions to ensure that the EU requirements are met accordingly. This supported the notion that the MIB was an emanate of the State, and each of these criteria are examined in the following section.

4.5.2.5. State Service

The MIB discharges the compensatory role required under Article 10 of the MVID, which is the government duty. Yet, the MIB claimed it was no more than a private organisation to which the

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[333] *Byrne v The Secretary of State and the MIB* [2007] EWHC 1268 (QB).

[334] *Farrell v Whitty* (n 100).

Directive does not directly apply. The MIB argued that it was not a public organisation but a privately funded, owned and managed contractor. Nevertheless, the fact that the MIB is a privately funded and owned contractor does not mean that the body is not in charge of a public service as required under the MVID, and it delivers, on behalf of the government, a public service. For example, the MIB lobbies to enforce certain provisions in order to minimise the number of claims made by victims of uninsured and untraced drivers. It does so to reduce the number of uninsured vehicles in the UK, which is undoubtedly in the interest of the public. However, in contradiction to its assertions on this basis, in *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986][335] the CJEU did not differentiate between a public body carry out its role as a public service and its other private arrangement in order to fulfil other duties.

The MIB, in this respect, discharges a public service role, which is a government responsibility under the Directive. It, therefore, represents the government and the Directive is capable of having direct effect against it (the MIB). However, the MIB may challenge the fact that neither the Directive nor the CJEU has a clear and precise meaning of the concept of 'public body' and 'public services' on which a claim can be made to treat an organisation such as itself (the MIB) as part of the State. It is true that there is no such precise definition of these terms under the MVID or through the jurisprudence of the CJEU, but nonetheless, that is not because the terms do not apply to other States, it is because the Directive, from the beginning, aimed not to intervene in Member States' national power constructions and authorities. The Directive deliberately left it to Member States to achieve the objectives set out in the Directive in the way which suits each Member States best, or otherwise it would contradict itself to narrow the wide discretion given to those States. Therefore, neither the Directive nor the CJEU shall intervene in such matter but to work in line with it and leave it to the States to implement the Directive as required in the first place. Furthermore, it is not

[335] *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

important to give precise definitions to public authorities as far as it delivers a public service, regardless of how the body discharges the service, especially where the service delivered is a State responsibly which is the case with MIB.

To conclude, the MIB discharges public service to ensure that victims of uninsured and untraced drivers are compensated as required under Article 10 of the MVID. The Directive is superior to the UK's national law. Therefore, the service (its scope, restriction, exclusion clauses and limitations) must be determined by the MVID and not by any other statute. Finally, the question is not whether the service can be called a public or private or not, but if the role played by the body could amounts to be a public service.

4.5.2.6. State Power

The Secretary of State for Transport and the MIB assert that the obligations imposed under Article 10 of the MVID are delivered through private law Agreements. Therefore, the MIB, which is the one in charge, cannot be held to be an emanation of State. It is true that the MIB's obligation derives from its Agreements with the government and not as an Act of Parliament. However, the MIB has statutory backing, which makes it part of the UK legislative scheme in this respect (see *Hussain [2017]*).[336]

Furthermore, what is important here is not the name under which the UK meets its obligations required under Article 10, but the power the chosen body exercises to deliver the duties imposed by the article (to deliver the right compensation conferred on third-party victims of road traffic accident under this article), which is through the MIB. Therefore the MIB is an emanation of State

[336] *Cameron v Hussain & LV Insurance* [2017] EWCA Civ 2725.

and not an independent contractor as it claims or otherwise it would not have the power to discharge its duty as the national compensatory body. In other words, the MIB delivers a public service that requires special powers to meet the government's obligations to comply with the Directive and without which the State would be in breach of its duty under Article 10 of the Directive. In *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986][337] for instance, the CJEU, and in spite of his independent job, ruled that the office is not a private individual delivering a private service but rather it discharges a public service to maintain the public service. Therefore, it represents the State and the State cannot rely on its failure to avoid its liabilities towards victims' rights conferred on them by the Directive. The MIB is neither directly appointed by the EU nor it can rely on the Directive to discharge its role without the support of the UK government to ensure it is equipped with the right legal support to fulfil its duties.

If the MIB, in spite of the earlier facts, denied that it had special powers that may have held it to be an emanate of State, the question is that what would happen if the government, for instance, decided to terminate the Agreements with the MIB? The MIB would definitely have no power to act as a compensatory body (under Article 10 of the Directive), which proves that the MIB derives its power from the State. That power cannot be obtained by contracting with other parties in order to restore it again but only through the government. Furthermore, the government has the power to sign another agreement with any other third-party to fulfil its duty under Article 10. In other words, any body, regardless of its legal form, would not have the power to discharge its role as a compensatory body (implement the Directive (Article 10) unless it contracts with the government and not with anyone else, which is proof to claim that the MIB is an emanation of State in this respect.

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337 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

Finally, the MIB rely on the levy imposed on its members to discharge its duty. Therefore, the government has to provide the MIB with such power that allows it to impose the levy and where an insurer refuses to contribute to it, then it can, for instance, reject its membership which makes the insurer unable to operate in the UK. Insurers in turn increase its premiums to ensure the fund required by the MIB is available. Such power cannot be obtained by contracting with normal parties but through the State. In other words, the MIB indirectly imposes and enforces a levy on the public (policyholders) through its members (motor insurers). In *Griffin & ors v South West Water Services Ltd* [1995][338] for instance, the court held that a utility company is subject to direct effect of the EU Directive due to its duty and the power it exercises, which makes it an emanation of State.

4.5.2.7. State Control

There is a treaty obligation on the UK to fulfil its duty towards the EU to meet all its obligations. Therefore, to establish a compensatory body (the MIB) and then claim that it has fulfilled its duty under Article 10 is a false claim unless it keeps some element of control that can guarantee its duty has been fulfilled, otherwise it would be in a breach of the treaty obligations as the duty imposed under Article 10 is its (the government) duty and not the duty of the MIB, but it is derived from its duty (see for instance, in *Byrne*,[339] where cl 4(3) UtDA 2003 was amended by the Secretary of State).

The MIB may argue that it is an independent organisation that the government has neither supervision nor control over it. Such a claim cannot be true as it (the MIB) is chosen by the government to tackle the government responsibility to implement the MVID. Furthermore, the

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[338] *Griffin & ors v South West Water Services Ltd* [1995] IRLR 15.

[339] *Byrne v MIB* [2008] EWCA Civ 574.

Secretary of State for Transport is able to give general directions to the MIB (and to some extent the MIB is accountable to it (the Secretary of State). Therefore, there is a sufficient element of State control which makes the criteria required for this part apply to it. Moreover, close supervision by the State on the activities the compensatory body exercises is not an important factor (to satisfy this part) in order to claim State control but rather all it needs is to have some degree of supervision to ensure the service is delivered to the public accordingly, as States will be always in charge of public services, even when contracting with private bodies. Furthermore, the government appoints arbitrators to deal with disputes between the MIB and claimants against the MIB's decisions, which can be interpreted as another form of control. It is also worth mentioning that as the government is in charge of regulating motor insurers operations in the UK and imposes certain conditions to be met prior to any activities such as joining the MIB and to contribute to its fund by paying a levy of its premium in order to be authorised to act as an insurers in the UK, the result is that the MIB's activity is regulated by the government and under its control.

4.5.2.8. Direct Effect and State Liability

Due to the nature of the Directive, individuals (natural and artificial) cannot use the MVIDs directly in national courts against another individual due to the lack of the horizontal direct effect of Directives. However, where the provision of the Directive has been identified as being directly effective, it may be used directly in national courts against the State or an emanation of the State, which makes the status of the MIB a crucial element for claimants who wish to enforce their EU rights in national courts. In *Byrne v MIB* [2008],[340] the issue was about the level of protection provided under the MIB scheme as to whether it should be equivalent to that provided by the

[340] *ibid*.

insurer if the claim is to be directed to them, not the MIB. The CJEU had held that compensatory bodies required under Article 10 of the MVID are required to provide an equivalent and effective protection as the one provided by the national legal system. However, the Court of Appeal rejected the claim of the MIB as an emanation of the State. It held that the MIB had neither special powers nor could it be held to operate as a public service due to the nature of its Agreements, and therefore it fails to meet the *Foster* criteria.[341] This argument, however, was challenged by Birmingham J as an incorrect approach (see *Farrell v Whitty and Ors* [2008][342] and the joint cases of *Mighell v Reading,*[343] *Evans v Motor Insurers Bureau, and White v White)*.[344] However, as mentioned earlier, it became increasingly untenable to deny that the MIB was authorised by the government to fulfil its duty under Article 10 of the MVID.[345]

4.5.2.8.1. *The* Foster ***Case***

In *Foster and others v British Gas plc*. [1990],[346] the CJEU held that where there are precise and unconditional provisions that confer rights on individuals, it may be relied upon in front of national courts against public bodies that exercise State authority or any special power that private bodies cannot. However, the *Foster* criteria are not set for every single case, rather they outline a system for general application. Therefore, it has not been necessary to establish every single criterion in the same way as provided for in the *Foster* test insofar as there are some elements of them to support a

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[341] *Foster* (n 333).

[342] *Farrell v Whitty and Ors* [2008] IEHC 124.

[343] *Mighell* (n 300).

[344] *Griffin v South West Water Services Ltd* (1995) IRLR 15.

[345] Article 1(4) of the Second Motor Insurance Directive.

[346] *Foster* (n 333).

claim. Regardless of the parties referring to their relationship as a private agreement, that the service the MIB discharges is a public one and not private, and that the MIB operates under the control of the State satisfies the *Foster* criteria. Most importantly, Member States must not take advantage of a failure to comply with the MVID. The Directive in this respect is clear in the obligation imposed on Member States, and Member States are responsible to meet this obligation. Regardless of the body in charge (public or private) or the effect of the MVID (direct or indirect), individuals have the right to secure fair compensation for their loss or personal injuries according to the MVID wherever and whenever the Directive confers rights on them, which makes States' failure to implement the Directive irrelevant. (see for instance, *Klaus Konle v Republik Österreich* [1999]).[347]

The UK has chosen the MIB to meet the Directive's obligations which is a public service and empowered it (the MIB) to deliver on that duty. In this respect, the *Foster* test is to be used as guidance not as if it was a statutory precondition that must be strictly applied to each and every single case or otherwise its application cannot be relied on.

4.5.2.9. Conclusion

The MIB, and the Agreements it has entered into with the State, exists in order to ensure victims of uninsured and untraced drivers are protected from being left uncompensated which otherwise would breach the protective purpose of the MVID. However, victims of such accidents could be in better position if the MIB operates as a last resort of compensation without interfering in the design of these Agreements. It adds an unnecessary element of complexity where the Agreements, which are designed by it, contain exclusions and administrative hurdles designed, it would seem, to frustrate

[347] Case C-302/97 *Klaus Konle v Republik Österreich* [1999] CJEU.

claimants from accessing compensation as victims of road traffic accidents. The MIB is either an emanation of State and thus where it falls short in securing the right to compensation according to the MVID, it becomes liable to directly enforceable EU laws, or other routes such as a *Francovich*[348] action can be used to correct the shortcomings of the national law.

The MIB needs to change its unlawful practices of imposing unfair exclusions and limit itself to the exclusion clauses permitted by the MVID. Its adopted procedural rules should be reviewed and enable claimants easier and unfettered access by, for instance, adopting use of clear and precise terms and using plain English that lay people can understand and remove unnecessary requirements that innocent victims often struggle to meet. The complications arising when seeking compensation through the MIB is difficult to reconcile, not only for the claimant (ordinary people) but for practitioners too, which may harden the route to compensation as claimants usually do not take litigation risks, especially if they are advised by experts. Finally, no mechanism whatsoever been used (up to the time of writing this thesis) to closely guide or to control the way in which the MIB works. The MIB is a not-for-profit body. It, however, receives millions of pounds with no clarity as to where it is spent (the money is collected from premiums). Being a private company, it is not subject to the same level of external scrutiny as a public company would be. Nor does it answer in the same way to shareholders and, given that all insurers who wish to operate in the UK must be members of the MIB, it is a closed-shop which may act with a level of unaccountability and one with substantial power to influence government policy and extra-statutory activity.

[348] *Francovich* (n 297).

CHAPTER FIVE: The Untraced Drivers' Agreement: Problems with Compatibility

5.1. Introduction

Motor insurance law has recently received greater attention from academics. However, this particular area of the law (the consistency between the two sources of law in respect of third-party victims' rights and the newest agreements between the Secretary of State and the Motor Insurers' Bureau (MIB)) has yet to attract academics' attention. Therefore, this author intends to contribute to knowledge by thoroughly examining third-party victims' rights in relation to road traffic accidents under the UK national law through an extensive examination to determine whether national law operates in conformity with its EU parent. In particular the author focuses on the recent developments in this area of law including judgments from the Court of Justice of the European Union (CJEU) and the MIB's 2017 Agreements. The author will further examine the impact of Brexit and the unexpected shift of the UK judiciary towards complying with EU law. *Vnuk*[349] and the resultant consultation survey will form part of this study, and finally the author discusses, for the first time in academic and practitioner literature, the possibility of dis-applying the law (or part of the law) under a *Factortame*[350] action instead of relying on the out-dated compensation approach in *Francovich*.[351] The previous chapter provided a critical review of the national law in relation to the statutory Road Traffic Act 1988 (RTA88) and the extra-statutory Uninsured Drivers' Agreement 2015. That Agreement was subject to an amendment in 2017 which removed some of the most egregious breaches of the Motor Vehicle Insurance Directive (MVID) but it was largely a similar

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[349] *Vnuk* (n 11).

[350] *Factortame (No 2)* (n 8).

[351] *Francovich* (n 297).

(essentially redacted) Agreement. There has been no systematic review of the latest Untraced Drivers' Agreement (UtDA) 2017 in the academic literature and this chapter provides the first critical review of it – outlining the breaches of EU still found in this implementing national measure.

5.2. The Untraced Drivers' Agreement 2017

The first area where my thesis will make a substantial contribution to knowledge is through a critical examination of the UtDA 2017, and how this may (negatively or positively) affect third-party victims of road traffic accidents. In this Chapter, the author systematically examines the 2017 Agreement in relation to its compatibility with the MVID, highlighting the possible deficiencies in the transposition that may undermine the protective purpose of the MVID. The author will determine how the Agreement affects the principle of legal certainty and, for the first time, the thesis offers a systematic and formal assessment of the issues surrounding national law in terms of third-party victims under the 2017 Agreement.

The UtDA 2017 came into force on 1 March 2017. However, the 2003 Agreement (the Agreement which preceded that most recent UtDA) applies to accidents occurring on or after 14 February 2003 and before 1 of March 2017. Under the UtDA 2017 and 2003, the MIB is designated as the compensatory body and insurer of last resort as it is the cases of the other MIB Agreements. Accidents occurring within this time frame are governed by the relevant Agreement. In respect of the previous Agreements, the MIB and the Secretary of State have frequently been criticised for the failure to draft a coherent and compliant document. Indeed, both Agreements (the UtDA and the UDA) fail to take into account the requirements of the MVIDs and to properly consult interested

parties to ensure that the Agreements achieve their target of protecting innocent third-party victims of road traffic accidents.

In this respect, and due to the 2003 Agreement's failure to meet the MVIDs' requirements, there was a growing demand for changes to the 2003 Agreement. The need for changes to rid the pitfalls of the 2003 Agreement led to the new one (the UtDA 2017). This new Agreement, however, was signed as other Agreements between the MIB and the Secretary of State for Transport aiming alongside with the other Agreements and the RTA88 to remove any elements of uncertainty that may arise as a consequence of contradicting EU law (the MVID). The law in this respect has struggled to achieve its minimum requirement required under the MVIDs. The exclusion clauses and procedural rules established under this Agreement, when thoroughly examined, cannot be deemed to provide any semblance of legal certainty. The 2017 Agreement is of the same quality in respect of compatibility with the MVID as was the Agreement in 2003 and as seen previously when the UDA 1999 was amended in 2015. The UtDA 2017 is complicated and imposes unacceptable exclusions and unfair procedural rules that if not met, denies victims' access to their rights. However, following the judicial review in *RoadPeace v Secretary of State for Transport* [2017],[352] some of the worst unlawful exclusions, such as terrorism exclusions, were removed as were others, such as property damage exclusions and some appeal processes related to arbitration. Regardless, the majority of the other breaches present in the 2003 Agreement were left unchanged.

5.2.1. The Scope of the 2017 Agreement

The reason that gives rise to the MIB's liability, under this Agreement, is that a claimant would have secured an award had his claim been made against an identified driver (the driver was traceable).

[352] *Roadpeace* (n 231).

An important exemption, from the outset, from the Agreement is that it does not apply to an accident where the driver was identified but cannot be traceable.

Under cl 3(1) there are certain conditions imposed on a claimant that must be met in order for the claim to proceed. However, a claim must first fall within the scope of the Agreement. The Agreement applies only to cases where a) there is death, bodily injury or property damage; b) that takes place on a road or other pubic place; c) that arises out of the use of a vehicle insured according to the RTA88 requirements (Part VI of the 1988 Act); and d) the accused person must be unidentified, and the claim must be made as required under this Agreement. The MIB has the right to reject any claim without even investigation if a claim does not meet these criteria – on the basis that such claims do not fall within its scope. Further, the MIB has the right to reject any claim falling within its scope if it (MIB) believes that the claim does not qualify to be considered (and therefore processed and awarded). This is in addition to the other exclusions present under cll 4-10. The issue here is that the Agreement not only unlawfully excludes claims from its scope (such as those to do with geographical restrictions) but also gives permission to the MIB to, where possible, apply exclusions to the ones that fall within its scope which may lead to exclusions based on its (the MIB) interest regardless of the victims' circumstances. For example, the Agreement repeated the same mistakes that exist under the other Agreements when referring to the definitions of '*road*,' '*other public place*' and '*motor vehicle*' as also apply in the RTA88. The referral reflects the reluctance of the MIB to ensure compliance with the MVID as such restrictions do not exist and are not allowed under the MVID. In other words, the claims of victims of hit and run accidents (where a driver involved in such accidents cannot be traced or identified), cannot be actioned against the MIB unless the vehicle was intended for use on the road and the accident happened on a road or other public place. This leaves accidents happening on private land, where public has no access, beyond the range of cover and with no route to compensation under this Agreement. The broad

interpretation of *Vnuk*[353] leaves this Agreement, in this respect at least, in breach of the MVID. The ruling in *Vnuk*[354] is clear that third-party victims must be compensated to the minimum required level by the MVID in any circumstances where an accident of a vehicle takes place and the use of it is consistent with the normal function of that vehicle. Furthermore, the requirement for insurance according to the MVID relies on the use of the vehicle, not where the vehicle is used. Therefore, the current national law scope of cover should be extended to have more vehicles covered. The government and its representative (the MIB) can no longer deny this state of affairs, particularly after the Court of Appeal decision in *Lewis v Tindale* [2019].[355]

In *Sahin v Harvard* [2016][356] for instance, Havard permitted an uninsured driver to drive her hired vehicle. The driver, who caused the accident, was not identified and Ms Havard refused to identify the driver (he was therefore an untraced driver). Sahin made his claim against the insurer of the hire car company. The insurer denied any liability as the liable driver was not insured by their policy. Longmore LJ held that the exclusion clause under the insurer policy applies here and freed the insurer from any liability as the damage was caused by a person who is not permitted by the policy. The request to appeal to the Supreme Court was rejected. However, his Lordship did not clarify whether the term '*unlawfully taken*' applied here or not, which is permitted under the RTA88.[357] In either way, the case was decided contrary to the line of reasoning available in EU law. The MVID does not permit such exclusion clauses. *Sahin and Bristol Alliance* provide evidence that UK national law does permit some exclusions against third-party victims[358] that the MVID does not.

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353 *Vnuk* (n 11).

354 ibid.

355 *Lewis v Tindale* (n 278).

356 *Sahin* (n 244).

357 Section 151(4) of the Road Traffic Act 1988.

358 A part of ss 148 and 151 of the Road Traffic Act 1988.

However, although such a claim shall be brought against the MIB (if the claimant failed to hold the insurer liable) as the claim meets the MIB requirement and fall into its (the MIB) scope, it is not clear if the MIB would fairly deal with the claim and compensate the claimant accordingly. Under this Agreement one can guess that the claimant, if his claim succeeded before the MIB, would not be entitled to the same compensation had his claim, successfully, been awarded by his insurer directly (see *Singh v Solihull Metropolitan Borough Council* [2007]).[359]

Finally, although one may conceive that the interpretation of the MVID, in respect of the position of the compensatory body as required under Article 10, to be a '*measure of last resort*' where the vehicle responsible is untraced, is restrictive. However, it is quite expansive in that it requires compensation be available to all unsatisfied claims where there is a cover required under the MVID. Therefore, the scope of the MIB should not be restricted by its Agreements with the government, rather it should be based on the MVID's requirement.

5.2.2. The Right to Appeal

A claimant may under cl 15 have the right to appeal against any of the MIB's decisions. For instance, where a claimant believes that his claim does fall within the scope of the Agreement and the MIB disagree, or where the compensation awarded by the MIB does not include interest and legal costs and so on, an appeal process should exist to an independent body. Unlike the 2003 Agreement, under the 2017 Agreement, the MIB shall take into account interest and legal costs when giving an award, which is a positive forward step considered to be in favour of third-party victims. It is nevertheless, limited. The right of appeal, under this Agreement, shall be made to an arbitrator rather a court. The appeal must be submitted within six weeks starting from the date a

[359] *Singh v Solihull Metropolitan Borough Council* [2007] EWHC 552.

claimant receives the MIB's notification of its decision. Failing to comply with it may result in his right of appeal being rejected. Furthermore, the appeal is based on written submissions, which means it may lack the effective consideration of other legal sources such as the MVID as well as the judgments of the CJEU. However, unlike the UDAs (1999 & 2015) or the previous UtDA 2003, either party (a claimant or the MIB) can request an oral hearing, and where it takes place, the MIB is in charge at its own cost to arrange where the hearing will be held. Furthermore, a claimant can under this Agreement decide to be represented by a lawyer and call for witnesses as well.[360]

However, the issue here is that the oral hearings may have some negative consequences that prevent a claimant from seeking this route of compensation. The appointed arbitrator has the right to order the claimant to pay the legal costs of the arbitration proceedings, taking into account the party which requested the oral hearing if it was unnecessary, or if there was an element of fraud. It is also worth noting that although generally the arbitrator's fee is to be paid by the MIB, the arbitrator has the right to permit the MIB to recover such fees from the claimant or his representative if, for instance, he (the arbitrator) believes that written submission were sufficient to decide on this matter (with no ground for appeal). However, it is perhaps understandable to have such orders against the claimant in cases of fraud, but how and based on what matters the arbitrator can decide that the oral hearing or the appeal was unnecessary is another issue. Further, the claimant has no right to appeal against the arbitrator decisions. Such practices contradict the MVID's aim to protect third-party victims as to require them to bear the cost of procedural matters when seeking justice. This may also breach the principle of equivalence and effectiveness as the case would be dealt with differently had the unidentified driver been identified and the claim brought against him (see *Moore v Secretary of State for Transport, MIB* [2007]).[361]

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[360] Clause 19.12 (c & d).

[361] *Moore v Secretary of State for Transport, MIB* [2007] EWHC 879.

The decision of the arbitrator is final. Furthermore, the arbitrator is not allowed to rely on the MVID in his judgment or any other sources such as the rulings of the CJEU, rather he is restricted to what has already been submitted. The claimant has no right to appeal to a court and therefore the Agreement breaches the MVID to have fair appeal as well as the requirements of the European Convention on Human Rights to have a fair and open hearing.

5.2.3. Exceptions within the 2017 Agreement

There are certain clauses under this Agreement which the MIB can rely to totally or partially avoid liability when it comes to claims made under the UtDA 2017:

5.2.3.1. Deductions

The 2017 Agreement permits the MIB to deduct any other payments that the claimant is entitled to or received.[362] It is an unlawful practice (exclusions and deductions) not only under this Agreement but under the UDA 1999 and 2015 as well as the UtDA 2003. The MIB can deduct an amount of money paid in relation to some road traffic accident claims. The question here is that if a person was unfortunate to get hit by an untraced motor vehicle, deductions from the payable compensation may be made by the MIB which would not be the case if the claim was handled by an insured and identified vehicle and driver. Therefore, how can a deduction be justified in such cases and claim at the same time that the victim was fairly compensated for his accident, where he in fact was compensated partially/fully by, in this case, claims made on the basis of his own health insurance. It is hard to understand the link between what the victim received in payment from his life insurance

[362] Clause 6(1) & (3) of the UtDA 2017.

cover (for which he has been paying) and the justifiable deduction of this payment from any compensation which would have to be made by the MIB.

In this respect, the MIB usually stipulates prior to any liability that a claimant who expect payment from other sources to assign to the MIB the right to such payment.[363] Although such deduction is permitted under the MVID too, the MIB Agreement breaches the victim's right to have fair compensation for that particular accident. However, the issue here is not to be blamed on the MIB alone but the EU too. Article 10 of the MVID requires victims of road traffic accidents to be compensated '*at least up to the limits of the insurance obligation*,' which means that victims must not be paid less than a similar claim made against an insured driver within the Member State. Nevertheless, the MVID does not specify the source of compensation but seeks to ensure equivalence in this respect. For instance, in *Evans v Secretary of State for the Environment* [2001],[364] the claimant was unable to recover his entitlement from the MIB. The claimant then, sought his claim through a different route, arguing State liability against the UK. He claimed that the UtDA 2003 did not comply with the MVID. The claimant argued that the 2003 Agreement failed to comply with the Directive in more than one aspect and his challenge was based on a) the legal status of the MIB; b) the lack of provision for the award of costs and interest; and c) that arbitration under the 2003 Agreement failed to comply with the European Convention on Human Rights (to have a fair and open hearing). The CJEU held that where there is an obligation for compensation, it is essential to consider interest alongside. The Court also accepted that the procedural rules of the arbitration were not fair and contradict the EU requirements. However, the Court dismissed the case based on the MIB's voluntary nature and it was referred back to the English High Court to decide if the conditions required under *Francovich* were met in this case.

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[363] Clause 10(7) of the UtDA 2017.

[364] *Evans* (n 264).

This situation continues under the UtDA 2017. However, since the 2017 Agreement, interest payments have been added.

To conclude, even if a claimant was fully compensated by the MIB, the claimant would still get receive a lesser payment than had his claim been made directly against an insurer. For instance, in *Cameron v Hussain* [2017][365] it was stated that '*the claimant might well regard a claim* ***under the UtDA as an inferior remedy*** *to a court action for damages and under Section 151*' which supports the claim that the levels of compensation awarded under the MIB action is less than one made directly before insurers. Furthermore, protecting third-party victims of road traffic accidents is legal requirement. For example, if a person used or permitted others to use his vehicle on a road or other public place with no legal cover obtained according to Part VI of the RTA88,[366] he, in such case, commits a criminal offence[367] (see *Monk v Warbey* [1935]).[368] The aim of such legislation is to ensure that third-party victims will not be left uncompensated and thus when the MIB is permitted to fail to meet its obligations in this respect, it undermines not only the MVID but the RTA88 too.

5.2.3.2. Joint (but Seemingly not Several) Liability

The MIB, under cl 23 of the Agreement, may refuse to meet its liability in full where death or injury or damage to property was caused by more than one person and one or more of them was identified. The MIB may proceed on the basis that as they (the drivers) shared responsibility for the death or personal injury, they too shall share liability. The MIB, in such cases, reduces its liability to the ones

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[365] *Cameron v Hussain & LV Insurance* [2017] EWCA Civ 2725.

[366] Section 143 of the Road Traffic Act 1988.

[367] Section 143 of the Road Traffic Act 1988.

[368] *Monk v Warbey* [1935] 1 KB 75.

who were unidentified and leave the remaining responsibility to be met by the ones identified. Although such deductions might be permitted under the MVID as the MIB could argue that it is an insurer of last resort and only liable for untraced and uninsured drivers, it is however, not clear under this Agreement how such claims would be settled in favour of the victims (to provide them the right compensation). Furthermore, the MIB's liability in such cases would be based on what proportion of loss that can be attributed to the unidentified person/s concerned, which may undermine the right of the victim to fair compensation according to the MVID as its (the MIB) award would be based on probabilities (disproportionately). Finally, what if the other liable person/s cannot meet their liability toward the victim? Victims' rights of such incidents would be definitely undermined under this Agreement, which oppose the protective purpose of the MVID.

5.2.3.3. Derogated Vehicles

As the case in the other MIB's Agreements, accidents caused by derogated vehicles do not fall within the scope of this Agreement but are to be satisfied by the authorities in charge of such vehicles (such as the ones operated in the name of the Crown). The Agreement does not differentiate between accidents occurring by such vehicles while owned and possessed by the Crown and where, for instance, they have been unlawfully used by an unidentified person/s as victims of such accidents may be left without compensation. The MIB may deny responsibility even where a derogated vehicle has been unlawfully taken.

5.2.3.4. Damage to Property

The 2017 Agreement stipulates that an award for property damage is conditional on a claimant suffering personal injury from the same accident. The injury must however be '*significant*' and an award has been satisfied by the MIB in order for it (the MIB) to proceed the claim for property damage. Furthermore, the MIB does not process property damage claims unless the claims exceed £400. Such requirements reflect no good faith but MIB may argue for the need to take these measures to prevent fraud as they could lead to an uncontrollable number of claims being submitted. This, nevertheless, should not operate at the expense of innocent victims of untraced drivers but should be balanced (as ultimately it is the duty of the MIB to have the right measures to control for such issues, not the victims). Therefore, the MIB should not be in a position to exploit such incidents to undermine third-party victims' rights of untraced drivers and thereby the MVID.

5.2.3.5. Passenger Claims

Under cl 8(1) of the UtDA 2017, the MIB has the right to deny any liability in respect of death, bodily injury or property damage arising out of the use of a vehicle where a claimant voluntarily let himself to be a passenger in a vehicle and he '*knew or ought to have known*' that the concerned vehicle; a) was stolen or unlawfully taken, or b) uninsured according to the national requirement (Pt VI of the RTA 1988). However, the use in the course or furtherance of a crime or to escape from lawful apprehension, which is applicable to any case fall into the scope of the 2003 Agreement, is removed from this Agreement. To some extent, there is no objection to the exclusion permitted under this Agreement as it is permitted by the MVID too. However, the issue here is that the 2017 Agreement applies constructive knowledge rather than actual knowledge – in a similar way to that

provision in the UDAs 1999 & 2015. A passenger who voluntarily let himself in the vehicle which caused the personal injury or property damage, is excluded under the UtDA 2003 if he unreasonably failed to leave the vehicle when possible. Further issues include use of the term '*unlawfully taken,*' which widens the number of claims that fall beyond the scope of the MIB's liability as well as the restriction applied to only those vehicles insured under the RTA88 which excludes even more vehicles (and thereby claims available for victims). Furthermore, the limitation to the MIB's liability relating to a '*vehicle used without a contract of insurance* ***in relation to its use****'* may imply a knowledge in certain situations but it would be questionable how someone knew or ought to have known that the vehicle being used was being so used in relation of its use according to the policy. However, that contradicts the clear statement of Article 10 of the MVID as to permit exclusions only in case of an '*uninsured'* vehicle where the passenger '*knew*' (and this can be proved) of this status. The Agreement widens this to include '***in relation to'*** its use.

Back to the removal of the exclusion clause '*in furtherance of a crime*' the MIB successfully, in *McCracken v Smith and Ors* [2015][369] for instance, argued that they are not liable for any damage suffered by the victim due to his criminal conduct (the victim was a passenger on a stolen vehicle). The issue here is that despite of the removal of the exclusion clause it remains valid and can be used against the interests of third-party victims for incidents occurring prior to 2015 (see for instance, *Smith v Stratton & Anor [2015]*),[370] which reflects the unwillingness of the courts to take EU into account when interpretations the law).

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[369] *McCracken v Smith and Ors* [2015] EWCA. Civ 380.

[370] *Smith v Stratton & Anor* [2015] EWCA Civ 1413*:* Laws LJ held that the crime exception could be used against the claimant as the Agreement's clause continued to apply to cases occurred prior to the 2015 Agreement.

5.2.3.6. Burden of Proof

Under cl 8(3) of the 2017 Agreement, the burden of proof is to be satisfied by the MIB that the claimant had the knowledge required under this Agreement in order to permit the exclusion. However, that was the case under the UtDA 2003 too. In this respect, the MIB may prove that the claimant knew or had reason to believe that the vehicle concerned is uninsured, stolen or unlawfully taken by proving that 1) the claimant is the owner or the register keeper of the vehicle concerned (or permitted its use), 2) the vehicle is being used by a person who is below the minimum age to have licence and therefore unable to be covered by a policy and 3) that he is disqualified from driving. If the MIB can prove that the claimant knew or had reasons to believe in any of such matters then it (the MIB) would be deemed to discharge its duty in respect of knowledge. The knowledge requirements under this Agreement seems to be sufficiently wide to make it easy for the MIB to shift the burden of proof to the victim, which can be deemed to breach the clear and simple requirement applied under the MVID (see *Phillips v Rafiq* [2007]).[371]

To conclude, the term '*knew or had reason to believe*' is vague and can be misused by the MIB to claim that knowledge is proved by, for instance, proving negligence whereas the MVID's term used is '*knew*,' which requires actual knowledge. Such conflict between the two terms is very clear that the Agreement term is unlawful and needs to be restrictively interpreted to be compliant with the MVID, if not to be removed and replaced entirely by that used in the Directive.

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[371] *Phillips v Rafiq* [2007] EWCA Civ 74.

5.2.3.7. Obligations Imposed on Claimants

Under this Agreement, the MIB requires a claimant to comply with its requirements and submit his claim using its form. Furthermore, the claimant shall do so within a reasonable time once it is required and as it is required by the MIB. Failing to comply with this requirement means that the MIB can reject the claim. However, although the requirement to report to the police has been removed under this Agreement, it was applicable under the 2003 Agreement and it is still to be met if the MIB requires the claimant to do so. Under cl 10(5), the MIB requires a claimant to support his claim with satisfactory evidence and notification of costs, if applicable. Furthermore, the claimant shall make the property available for inspection if required by the MIB. If the claimant fails to prove that there is loss (property damage) caused by a vehicle, supported by evidence of the cost to repair the damage caused by the concerned vehicle, he would be considered to fail to comply with the Agreement's requirements, which would result in his claim rejected. The clause is, however, merely a copy-paste of the previous Agreement, which reflects nothing but the MIB's bad-faith in failing to develop this area of law.

The 2017 Agreement, under cl 23, imposes obligations on the claimant that he must take all necessary steps in order to secure a judgment against an identified person/s who may be liable (partially to entirely) for death or property damage arising out of the use of a vehicle. The new clause imposes the same obligation required under the previous Agreement. Furthermore, a claimant, under cl 10(7), must acquire, where he succeeded, transcripts of the judgment and assign it to the MIB where required. However, by virtue of cl 11(6) a claimant cannot take an action against the driver at fault by himself without reference to the MIB. He is required to notify the MIB as soon as reasonable possible, as required by the Agreement.

And finally, under cl 11 the MIB would only make an award in case of death, bodily injury or damage to property arising out of the use of a vehicle if such an award would be issued had the person been identified. The award under this clause is based on the MIB's assessment to whether or not the claim can be made. The issue that may face a claimant is that his claim would be decided based on probability and entirely at the discretion of the MIB, which may undermine the victims' right to have fair compensation for his loss or body injury.

5.2.3.8. Payment and Vulnerable Victims

Under cl 13(1) of the UtDA 2017 as well as the 2003 Agreement, the MIB is required to make payment within 14 days of the judgment once a claimant has accepted the MIB's award. However, in the case of absence of any notice in respect of acceptance (no reply received by the MIB or a notice of appeal), the MIB shall wait until the time specified for the appeal to lapse, then it (the MIB) shall release the payment within the next 14 days. In doing so, the MIB would be considered to meet its obligations towards the claimant under this Agreement. However, unlike the UtDA 2003 where the MIB deals with claims involving mentally incapable victims with no legal protection provided (no protective measures whatsoever to ensure vulnerable victims such as children and mentally incapable victims are protected against unfair treatment that may risk their rights for fair compensation), the 2017 Agreement does provide some sort of protection to such victims when it takes into account the victims' ages or capacity to accept an offer made by the MIB. The 2017 Agreement offers protection to vulnerable victims through an arbitrator chosen by the Secretary of State to approve any award made to them by the MIB. Under this Agreement, the chosen arbitrator may request an oral hearing in order to prove an award made for incapable victims. However, the arbitrator has no power to decide on such disputes but only to approve what has been already decided by the MIB. If approval is refused by the appointed arbitrator then the MIB, under cl 14(12)

(b), can request the appointment of a second arbitrator to submit to him its first proposal of the award (not to offer another one), which may make procedural approval questionable as to either be in favour of the MIB or to seek, under this clause, another arbitrator to approve what has been refused by the first. Furthermore, such a right to request another arbitrator to be appointed is not given to victims if, for instance, a victim was not satisfied with the MIB's award. However, such victims are often, naturally, unable to assess whether or not their entitlement is fair. The decision of an arbitrator is final, and the MIB is to pay the cost of the arbitrator.

In this respect, proper protection might be achieved by, for instance, imposing provisions that such settlements must be approved by a court. The Agreement, in this regard, may undermine the protective purpose of the MVID of the equal treatment to victims as such awards shall not be negatively affected because of factors such as the age and health conditions of the claimant, where and when the accidents happened and under which law the case was brought. Therefore, referring such cases that involve vulnerable people to a court for approval would offer better protection. In *Byrne v MIB & Secretary of State for Transport* [2007][372] a child was injured by an unidentified driver and therefore the case was dealt by the MIB. The three-year-old child was denied his right of compensation by the MIB due to the (harsh) application of a time restriction for the submission of his application. The court held that the three-year time restriction as applicable in the UtDA 2003 breached the MVIDs and the claimant was awarded his full compensation.

[372] *Byrne* (n 335).

5.2.4. The 2017 Agreement and Legal Uncertainty

With regard to legal rules, where an element of uncertainty exists, then predictability is hard to ensure. That becomes harder where codes are complex which results in their application becoming complex too. However, that is not the case in respect of the MIB Agreements. The requirements within the MVID are clear, precise and easy to understand and follow, especially given the instruction provided by the CJEU. However, the MIB insists on ignoring the guidance previously provided and seems reluctant to seek assistance from the CJEU in achieving a consistent interpretation and application of the law via the UtDA. However, the government may have the right to claim that the MVIDs are not clear as to what is permitted and what is not, which made it argue that the MVIDs' objectives have been met under the current national laws. However, although such argument can, to some extent, be valid for some time, it is not anymore, and especially following the CJEU's interpretations in *Bernáldez*[373] and *Candolin.*[374] Therefore, and to remove further uncertainty as demonstrated in this Chapter, national courts should take into account the jurisprudence of the CJEU to narrow the different interoperation and to achieve consistency.

5.2.5. Issues Related to Procedural Rules

There are two routes for compensation under the MVID. The first is where there is a cover (a policy of insurance) required under the MVID,[375] then the cover must be good. The second is where there is no cover at all, therefore such a claim should be sought through the compensatory body.[376]

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[373] *Bernáldez* (n 238).

[374] *Candolin* (n 260).

[375] Article 3.

[376] Article 10.

However in regard of UK national law there is a marked difference in terms of the procedural rules and the amount of compensation available between the first and the second of these options. Issues related to the national law is more problematic for victims of road traffic accidents as avoidance tactics applied by insurers are often not in favour of the victims which undermines their rights of compensation as well as the aims of the MVID. A claim made under the UtDA with the effect of those clauses (exclusions and limitations) certainly prevents third-party victims of their entitlement of compensation - partially or entirely. The same claim would have been resulted in a different conclusion had it been sought under the MVID or directly against the insurer. Reaching two different conclusions that are supposedly one reflects the poor implementation of the MVID. However, one (the MIB) may argue that such exclusions, restrictions and requirements have not been introduced in bad faith but to face claims that are not made in accordance with acceptable standards. Nevertheless, whilst it is understandable that the MIB aims to control improper claims, which ultimately cost policyholders (through increased premiums) as a result of, for example, fraud, the exclusions are clearly in breach of the MVID and cannot be justified to deprive innocent third-party victims of their rights.

Furthermore, the problems in respect of procedural rules to be challenged on the basis of a breach of the MVID can be problematic as the Directive does not specify or have generic rules on how Member States need to achieve the aims of the MVID. These are left to national laws for determination. However, in *Evans*,[377] the CJEU stated that national rules should not be less favourable than the ones (procedural rules) governing similar matters under domestic law. The duty to check whether or not the procedural rules apply the principle of equivalence is on national courts, not the MIB or the Secretary of State for Transport. Finally, terms, conditions and exclusion clauses agreed upon by the contracting parties and any permitted exclusions under the MIB's Agreements

[377] *Evans* (n 264).

shall all be restrictively formulated and interpreted in a way that does not contradict the purpose of the MVID, but gives effect to it. To ensure effectiveness of the Directive, national procedural rules and provisions must not contradict the purpose of the MVID or even make it more difficult to obtain the protection stated under the Directive.

5.2.6. The *Marleasing* Principle

Although the *Marleasing*[378] principle gives permission to national courts, when interpreting the law, to look further to the purpose of the legislation beyond its narrow interpretation, national courts, at least in this respect, often refuse to refer to the MVIDs. This may be due to the nature of the EU Directive itself as it does not require one level of cover but it permits differences that national courts can apply. Moreover, the government or its compensatory body may argue that but the duty to apply a *Marleasing* purposive construction does not apply to the Agreement. However, in its judgment in *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2005],[379] the CJEU stated that national courts have a duty to interpret any national law that was chosen by a Member State to give effect to the MVIDs to assume that the national law considered in front of it intends to fully comply with the Directive to meet the objectives set out by it (the Directives). Therefore, if the Agreements were enacted to fulfil the UK's duty in this respect, then the *Marleasing*[380] and *Pfeiffer*[381]-style purposive construction applies to it. If not, then, the UK has failed to have the right statutory implementation/transposition of the MVID.

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[378] *Marleasing* (n 254).

[379] Case 397/01 *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* [2005] 1 ECR 8835.

[380] *Marleasing* (n 254).

[381] *Pfeiffer* (n 381).

5.3. Conclusion

Under the UtDA 2017 claimants are confronted by many different misleading notice requirements and unlawful exclusions. It is difficult to reconcile how the UK has maintained its position of allowing the application of this extra-statutory provision when considered in light of both the MVID and the growing and extensive jurisprudence of the CJEU. It is particularly concerning that both the UDA and the UtDA are drafted by the MIB and then agreed to, without revision, by the Secretary of State. This state of affairs is likely to continue given the recent general election (December 2019) and the Conservative government which has presided over the MVID for the past nine years. It is unlikely to be remedied through legislative or administrative action, and the courts appear sometimes to be willing to provide an EU-consistent interpretation of national provisions and at other times refuse to be swayed at any other conclusion than, holistically, national law satisfies the requirements of the MVID. Hence, to preserve consistency, a movement to disapplying the conflicting national law to remove the source of the conflict may be the most positive way forwards before the UK's exit from the EU and a new RTA, UDA and UtDA can be enacted.

Chapter Six: Beyond Francovich - Can Factortame Provide an Answer?

6.1. Introduction

Perhaps the most significant contribution of the thesis, and certainly the most controversial, is the discussion as to how the enforcement of the MVID may take place. It is true that aspects of the MVID have been granted direct effect, and given the judgment in *MIB v Lewis* [2019][382] that the MIB is an emanation of the State, this has broadened the opportunity for those directly effective aspects of the MVID to be given effect in national courts. Indirect effect has also been somewhat effective to receptive courts, although the distinction between a *Marleasing*[383] approach and that required in *Pfeiffer*[384] which expands the duty broader than simply the courts seems to have been underutilised nationally. However, each of the above mechanisms for the enforcement of EU law in national courts have been rather limited in practical terms, frequently because of the opaqueness of the remedies and, as Marson and Ferris[385] explain, the teaching of EU law principles often fail to instil in future lawyers and judges the muscle-memory of assessing, comparatively, EU laws and their national transposing measures. Whilst not an enforcement mechanism, as it forms part of a body of rules which enables affected individuals to seek redress from the State for damages or loss caused by its breach of EU law, 'State liability' is a mechanism which has been available as a source of redress for third-party victims. The doctrine of State liability was established in

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[382] *MIB v Lewis* (n 6).

[383] *Marleasing* (n 254).

[384] *Pfeiffer* (n 381).

[385] Marson. J. and Ferris, K. 2016. Delaney and the Motor Vehicle Insurance Directives: Lessons for the Teaching of EU Law. 51 *The Law Teacher*. 411.

Francovich.[386] It will be remembered as a means for affected individuals to recover damages, yet even with some notable successes in the area of motor vehicles insurance, using it to compel Member States to adhere to their EU legal responsibilities has seen limited success. Indeed, it can also be stated with a degree of certainty that over many years, and until relatively recently by the Court of Appeal[387] and Ward LJ in particular on frequent occasions, that the courts have been reluctant to find the UK in breach of the MVID. This was notably demonstrated in the failed judicial review of the law started by the charity *Roadpeace*.[388] The cases demonstrate the need for fresh thinking around granting third-party victims of motor vehicle accidents access to their EU rights in light of a recalcitrant UK.

In addressing the instances of the UK breaching its obligations under the MVID, the problems inherent in the available enforcement mechanisms and the limitations in actions under State liability, an argument is presented for the inconsistent national laws in motor vehicle insurance to be dis-applied. Thus, *Factortame*[389] as a model for the halting of the application of laws in breach of the MVID may ensure compliance with superior EU law in a way that has been hitherto impossible to achieve. As demonstrated in Chapter 2, there has been no arguments established on this basis thus far and in light of the *dicta* in the Supreme Court judgment in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*,[390] an argument is presented that national courts not only can, but have a legal duty to strike down any national Act that does not comply with EU law.[391] Whilst it is

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[386] Cases C-6/90 and 9/90 *Francovich and Bonifaci v Republic of Italy* [1991] I-5357. It ruled that it is a principle of Community law, inherent in the system of the EC Treaty, 'that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.'

[387] *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267 and *Sahin v Havard* [2016] EWCA Civ 1202.

[388] *RoadPeace* (n 231).

[389] *Factortame (No 2)* (n 8).

[390] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

[391] Jay J. Arangone´s 1990. Regina v. Secretary of State for Transport ex parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law. Article 8.Volume 14, Issue 3.

accepted that *Factortame* was based on a Treaty Article and not an EU Directive, the MVID have their origin as giving effect to fundamental principles of the free movement of goods and of people. Similarly, in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* it was possible to argue that EU Directive 2011/92/EU should prevent the application of inconsistent national law relating to decision-making – in this case that concerning the construction of a new highs-peed railway. Given the MVIDs give effect to fundamental pillars establishing the effectiveness of the operation of the EU, the argument presented here may be more persuasive and result in a paradigm-shift in enforcement of EU motor vehicle insurance law in the UK.

6.2. Should the UK's Motor Insurance Law Be Disapplied?

There are certain requirements that any law is expected to respect (and beyond the formalities of its construction and adherence to constitutional requirements it should, as a minimum, provide a level of legal certainty) otherwise its legitimacy may be called into question. One of the fundamental requirements of the UK's constitution and the rationale advanced in this thesis for contravening aspects of the Road Traffic Act 1988 (RTA88) and the Uninsured Drivers' Agreement (UDA) and Untraced Drivers' Agreement (UtDA) to be dissapplied stems from the European Communities Act 1972 and associated case law which provides a means for the courts to adopt this course of action if they so choose. It is argued here that the UK's motor insurance laws breach fundamental principles of EU law. The national laws (the RTA88 and the MIB Agreements) may be argued to breach aspects of the EU's free movement principles when failing to provide the necessary protection for EU citizens (here it would be third-party victims of motor vehicle accidents). The national law further breaches fundamental principles to ensure legal certainty as it contradicts its EU parent law (although these would not find the remedy in national law being disapplied). Community citizens, under this current regime, cannot accurately nor adequately predict their legal position and therefore

their rights in advance when they decide to travel to, work or even live in the UK. Brexit[392] becomes another source of uncertainty as to whether leave the UK will leave the Single Market and Customs Union which will, if the UK chooses to leave without agreements, will end the UK's duty to fulfil the free movement principles. Furthermore, although not specifically pertinent to the arguments advanced here, national law possibly breaches Article 8 of the European Convention on Human Rights as it impinges on citizens' right to access to justice. Finally, currently national law does not comply with the effectiveness and equivalence principles required under EU law. The earlier mentioned principles, as they pertain to breaches of EU fundamental principles, are discussed to explain and offer a legal basis for the advancement of dissaplying inconsistent national laws which breach superior EU laws.

6.3. The Free Movement Principle - Brief History

The Free movement of EU citizens within the Community can be traced to the establishment of the European Economic Community in 1957.[393] The concept, later, was developed under the Treaty of Maastricht in 1992. However, EU citizens' right to move and reside in other EU States with, to some extent, no restriction was not achieved at this stage but required the passing of Directive 2004/38/EC[394] to give effect to this Treaty principle. The ultimate aim of the Treaty, and given effect via the enactment of secondary law, was to establish a Community where EU citizens can live, travel and move freely with as few restrictions as possible. It was borne of anti-

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[392] Which was discussed earlier in this chapter.

[393] The provisions 1 (1), 1 (2), 1 (5) and 2 (1) (4).

[394] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

discrimination and sought to harmonise rules through the Community to facilitate free movement of persons and goods.

6.3.1. Free Movement's Legal Basis

Free movement of EU citizens is a fundamental principle of the Treaty enshrined in Articles 21 and 45 of the Treaty on the Functioning of the European Union (TFEU) as well as Article 3 (2) of the Treaty on European Union (TEU). Article 45 of the TFEU states clearly that *'Freedom of movement for workers shall be secured within the Community*.' It is a treaty requirement, which has direct effect on national laws of EU Member States without the need for further legislation for implementation. Therefore, and in order for national States to secure freedom of movement as required under the Treaty, States need to ensure that people are fully protected when moving from one State to another. In other words, EU individuals shall not face any obstacles that restrict their rights of movement such as facing different legal system that may undermine their rights when they become victims of any type just because they have crossed borders within the Community. Any sort of restriction would be interpreted as a breach of the Treaty and requires correction. Furthermore, the EU, under the First Motor Vehicle Insurance Directive (MVID), aimed from the beginning to '*liberalise the rules regarding the movement of persons and motor vehicles travelling between Member States*.' Therefore, EU Member States such as the UK, which have been in breach of such requirements for a long period of time, need to correct the wrong and bring its national law into line with the MVID. This ensures the requirement of minimum standards of insurance are met for those travelling throughout the EU, and it ensures that cross-border travel is harmonised to the extent that no hinderance to people and vehicles is experienced when moving from one State to another, alongside providing a high level of protection for third-party victims of road traffic accidents as the MVID states.

6.3.2. Why Freedom of Movement is Important to the Community?

Free movement of people is one of the four founding principles upon which the EU is based. Article 3 of the Lisbon Treaty states that '*The Union's aim is to promote peace, its values and the well-being of its peoples... and shall promote social justice and protection*.' From this it is derived that free movement is a fundamental principle of the Community that cannot be achieved without social justice and protection. The EU's values which include *'equality and the rule of law'* cannot be achieved by, for instance, having different treatment for victims of uninsured or untraced drivers in comparison to claims made directly to insurers just because the drivers at fault were uninsured or unidentified.[395] Furthermore, it breaches citizen's rights to have their rights protected as it undermines other EU values (the rule of law) when the UK's motor insurance law breaches the MVID. As mentioned in Chapter Three, motor insurance has a significant impact on people's free movement as well as on vehicles, which entails the Community to intervene to ensure that this will not undermine the Community objective of unification. Moreover, when an EU citizen encounters different regulations just because he or she moved from one State to another, it may undermine their right of free movement, which is enshrined by an EU Treaty.

Back to the MVIDs where one of the drawbacks of the First MVID was the disparity between Member States, which was deemed a substantial barrier to free movement, especially in respect of the scope of cover, the exclusion clauses permitted by each State and the differences in insurance coverage applied by the Member States. This undermined the effectiveness of free movement. It

[395] Equality and the rule of law cannot be achieved too if citizens of one Community face different legal systems based on where an incident takes place.

entailed another Directive[396] to be passed to overcome the drawbacks of the first. The UK, however, was reluctant to remove the drawbacks that caused the disparities in respect of the scope and exclusions clauses permitted by its national law while the EU, since 1983, had tried to avoid such negative consequences. The consequence of failing to facilitate free movement would undermine the aim of the Community to encourage tolerance within the Community and to build trust and deepen integration between the different cultures within the EU. Therefore, and to ensure the protective purposes of the MVID was not undermined by the EU national laws, which if so, would undermine the free movement principle, the law needed to be amended again to facilitate compliance through the States. Here in the UK, the RTA88 as well as the MIB Agreements in many respects do not comply with the aims of the MVID to provide the correct levels of protection required by the MVID and thereby facilitating the free movements of people, goods and vehicles in the Community.

In this respect, the CJEU in *Carvalho v Companhia Europeia de Seguros SA* [2011][397] for instance, permitted a limitation to the drivers' damage due to the non-effect of such limitation on free movement as the existing exclusion of liability would not undermine the MVID. Furthermore, in *Finanger v Norway (National Association for Road Traffic Victims, intervening)* [2006][398] the Norwegian Supreme Court, for instance, stated that

> *The Motor Vehicle Insurance Directives* ***do not grant national authorities*** *a margin of political or economic discretion with regard to the requirement of insurance.….The purpose was* ***to pave the way for a Common Market with free movement,*** *and one of the means was*

[396] The Second Motor Insurance Directive, which was discussed in detail in Chapter Three.

[397] Case C-484/09 *Carvalho v Companhia Europeia de Seguros SA* [2011] RTR 10.

[398] *Finanger v Norway (National Association for Road Traffic Victims, intervening)* [2006] 3 CMLR 13.

> ***to achieve security for the survivors*** *of road traffic accidents... The development from the first to the third Directive shows that* ***a strong degree of protection was intended,*** *so that the various* ***exemption rules that existed in certain countries were forbidden***.[399]

The Court here alluded to the effect of unlawful exclusion clauses on the principle of free movement.[400]

6.4. Legal Certainty Principle

The UK, under EU law, is required to ensure that legal certainty is recognised as a central requirement for the rule of the law.[401] It is another fundamental principle of the Community. In this respect and although the MIB and Secretary of State for Transport have decided to remedy the gaps which have been risen as a consequence of the recent review in order to properly implement the MVID and work in line with it, they however, failed. The UK's motor insurance Law (the RTA88, the UtDA 2017 and the UDA 2015)[402] remains in breach of the MVID. The purpose of the new Agreements[403] however, was to bring the law into line with the MVID as both of the earlier mentioned Agreements are the replacement of the previous ones (the UDtA 2003 and UDA 1999). In other words, the new Agreements replaced the old aiming to remove illegal exclusion clauses as well as the existing unfair procedural rules that operated to undermine the rights and protection of third-party victims of road traffic accidents. The author believes that the reluctance of the State to

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[399] ibid.

[400] Any exclusion clauses shall be restrictively interpreted as such exception is considered to be a departure from the general rules to ensure that third-party victims are protected in respect of civil liability.

[401] Tom Bingham, *The Rule of Law* (Penguin, 2011).

[402] As well as the previews MIB's Agreements such as the UDA 1999 and the UtDA 2003.

[403] The UtDA 2017 and the UDA 2015.

consider the MVIDs to be superior to national law when legislating is the principal reason behind its failure,[404] which has led to noncompliance and contradictions between the two laws, which in turn causes uncertainty to this area of law. The UK's implementation of the MVIDs have been fraught with problems from the start. The exclusion clauses and procedural rules established under the MIB's Agreements, which produce a substantial negative consequence on legal certainty in this area of law (third-party victims of an accident caused by uninsured or untraced drivers) are a good example.[405] In *Macarthys v Smith*[406] for instance, there were disagreements between UK law and EU law. The Court of Justice of the European Union (CJEU) ruled that the contradiction between the UK Act and EU Treaty undermines the purpose of EU law to unify the Community. Therefore, the provisions of the Treaty were to prevail, but were to be permitted by the Member States to be directly applied.[407] This is an established principle of law of which all involved in the drafting and application of law are aware. Such disparity between the legal systems of EU Member States, if not removed, could mean that third-party victims of road traffic accidents would be treated differently depending on where an incident takes place, which would cause confusion to them as to from where they should claim.[408] Furthermore, such disparities may lead to a conflict between EU compensatory bodies as to which exclusion clauses are permitted, and what might need not to be covered by insurance under EU law. Such uncertainty to the interpretation of the law governing these issues would lead to a breach of the key principle of EU of free movement too. For instance, in December 1983, a proposal in the Second MVID recommended that Member States' national

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[404] The author's belief comes from the many case that were challenged and concluded that the UK is in breach of its duty in this respect (see Chapter Four).

[405] For further detail see Chapter Four.

[406] (Case 129/79)

[407] Article 141 of the EC Treaty conflicts with the Equal Pay Act 1970. Section 2(1) and (4) of the European Communities Act 1972 requires EU national courts to interpret national laws in compliance with EU law, and where necessary to override it. Available at, http://www.legislation.gov.uk/ukpga/1972/68.

[408] Sometimes to prefer to claim in a State where a claimant is confident that his claim has more chance to be excepted and the compensation is secured which may lead to a conflict between EU Compensatory Bodies.

laws, in respect of exclusion clauses, should have to abide by exclusion clauses permitted in EU legislation as the only permitted one/s. This aim was to remove uncertainty, so the ultimate goal of free movement and the Single Market was achieved. Whilst the recommendation was incorporated into the MVID and has been a feature of the law in this area since 1983, the UK, has yet to fully meet this requirement.

Therefore, it may be said with a certain level of confidence given the evidence presented in this thesis that the UK is in breach of one of the most important principles of EU law '*legal certainty*.' In this regard, lack of legal certainty means that not only lay people would fail to know their legal position in a matter facing them, but it is often unclear also for experts. A law where its provisions contradict each other and is full of technical and unnecessary terms would definitely and negatively impact on an individual's ability to decide on a matter, as many interpretations could be derived from its clauses. Therefore, being clear and precise in terms of exclusion clauses and restrictions as the case under the MVID means that lay people know their rights in advance before proceeding their claim, which supports the principle of legal certainty, and not only protects third-party victims but also the State against any liability that it may face as a consequences of its breach of the MVID. Compliance with the Directive by all Member States would lead to legal certainty and free movement with no obstacles, which is the main purpose of the MVID, and protect individuals at the same time.

In this respect, the UK's national courts have failed and are frequently at fault for the confusion and lack of certainty on legal issues relating to motor insurance vehicles. National courts failed to provide certainty in this aspect too when failing to give effect to the MVIDs (see, as way of an

example, cases including *EUI v Bristol Alliance Partnership*[409] and *Delaney v Pickett)*.[410] It is not a choice that a Member State can ignore as joining EU Community means joining its legal system, and as different Member States have distinct legal systems in one Community, an acceptance of the rules and regulations which facilitate harmonisation is necessary. Therefore, any incompatible national law with respect to EU law becomes unlawful, a source of legal uncertainty, and cannot prevail. To avoid that, such Acts shall be disapplied or otherwise individuals' rights would be in jeopardy. In *Italian Minister of Finance v Simmenthal*,[411] the CJEU stated *'The Constitution and laws adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'*[412] This is a clear statement that EU States are to give priority to EU law as any improper transposition without direct effect would be source of legal uncertainty.[413] The issue here is that (where the law is not disapplied) the UK's national courts seem to produce inconsistent interpretations of the national law, the appeal courts can produce inconsistent rulings depending on the composition of the bench, and this means the rights of third-party victims of road traffic accidents may not always be protected. For example, in *Clarke v Kato*[414] and after a referral by the Court of Appeal, Lord Clyde refused a claim of noncompliance with the MVIDs stating that '*there may be differences in the precise cover which national laws may impose in the different member states*.' Lord Clyde believed that the MVIDs left it to Member States to meet its obligations in this respect the way each State wished, and the UK had met its duty in this regard (the use of vehicles) to have insurance against civil liability. However, in respect of the scope

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[409] *EUI* (n 243).

[410] *Delaney v Pickett* (n 93).

[411] Case 106/77 *Italian Minister of Finance v Simmenthal* [1976] ECR 1871.

[412] Article 1-6.

[413] Brexit, which is another source of uncertainty to this area of law was thoroughly discussed earlier in this Chapter.

[414] *Clarke v Kato* [1998] 233 NR 381 (HL).

of cover, the court, in *Axa Insurance UK plc v Norwich Union*,[415] held that the UK was in breach of the MVIDs, which raises the issue of certainty as to the judiciary's interpretation of s 145 RTA88 under the MVID. In *Bristol Alliance*[416] the Court of Appeal permitted the application of an exclusion clause that is not permitted by the MVID, which is higher in rank than the High Court. The High Court (Tugendhat J) had held that national law must take into account the MVIDs and forbid such exclusions, which reflects uncertainty in this respect as to know based on what one may permit and other prohibit.

Another issue worth mentioning here is that the principle of legal certainty, in this particular area of law, is as well afflicted by what is known as '*public interest*.' The law in this respect (the public interest where insurers and MIB (sometimes) rely on to exclude third-party victims claims) is not certain. In *Patel v Mirza*[417] case for instance, Lord Sumption labeled the law in this respect as a mess. Further, Lord Toulson considered the state of the law concerning illegality

> *Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left-hand what it takes with the right hand.*[418]

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[415] *AXA Insurance UK plc v Norwich Union Insurance* [2007] Lloyd's Rep. IR Plus 45.

[416] *EUI* (n 243).

[417] *Patel v Mirza* [2016] UKSC 42.

[418] *Ibid* at [99].

Further, the term '*criminality*' is too wide that may include all criminal offences and treat them all equally irrespective of how serious the crime is such as to consider not putting on the seatbelt and the use of the vehicle to carry cannabis equally to deprive third-party victims of their rights. In *Farrell v Whitty*[419] for instance, the IMIB tried to avoid liability due to the passenger fault that she was setting on the floor of the van where the driver was uninsured too. The Irish Road Traffic Act 1961 did not cover such liability where a victim was involved in dangerous conduct, which results in the IMIB not being liable according to their argument (the government). One may struggle to envisage the relation between the incident and the dangerous conduct of somebody who was sitting in the back of a van as to permit an exclusion clause that clearly undermines the protective purpose of the MVIDs. In *Candolin*[420] for instance, the vehicle's owner was a passenger and a victim at the same time, which raised the question as to whether to hold him liable for his action and treat him differently and therefore deprive him from compensation, or as a passenger where he might secure a compensation like other passengers. The argument of the EU, however, was in favour of the passengers regardless of their legal status. In other words, passengers shall always be entitled to fair compensation, and any discrimination, in this respect, will go against the spirit of the MVIDs. Unfortunately, under the UK national law, the degree of blame (if partially/fully) is not clear as to hold the passenger liable for his action and therefore deprives him from compensation, which becomes a source of legal uncertainty. In *Storbrand Skadeforsikring v Veronika Finanger*[421] for instance, the European Court[422] held that the passenger who was deprived of his right for compensation due to an exclusion clause permitted by his country,[423] is entitled to compensation

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[419] *Farrell v Whitty* (n 344).

[420] *Candolin* (n 260).

[421] Case C-1/2006 *Storbrand Skadeforsikring v Veronika Finanger* [2006] 3 CMLR 13.

[422] The European Free Trade Association (EFTA) Court.

[423] Section 7 (b) of the Norwegian Bilansvarsloven 1961.

and s 7 of the Norwegian law could not be permitted as it undermines the protective purpose of the MVIDs. However, in *Lavrador v Companhia de Seguros Fidelidade-Mundial SA*[424] the CJEU permitted an exclusion clause applied under Spanish law that deprived the victim of compensation due to his contribution which led to his injury as he was cycling against the traffic. However, the Court justified such permission due to the victim's exclusive fault that led to his injury as such an exclusion did not deprive non-at-fault victims, nor would it impact on a limitation of insurance cover. The MIB, in this respect, may need to only consider serious crimes that cause accidents to be excluded rather every single offence such as forgetting to put on the seatbelt, and to ensure that there is some link between the accident and the crime committed by the third-party. In *Delaney*,[425] for instance, how can someone claim that the illegal act in such a case contributed to or caused the accident? The claimant's illegal action did not cause the incident therefore it should not be brought in as a factor unless he was, for instance, consuming drugs while driving that led him to lose control and cause the damage. Therefore, in situations where there is no an illegal act on the part of the third-party victim that made him victim but rather it is the driver's illegal act, the claimant in such case shall be fully compensated. Further, the author believes that there are no clear criteria on how to determine what acts will be deemed as an illegal act and what will not? In *Pinn v Guo & Ors*,[426] for instance, the insurer succeeded in avoiding liability based on the type of use that the driver was involved in and caused the accident (an illegal race on public roads) that was excluded by the policy. Such a claim to be excluded can be justified as an illegal race can pose a danger not only to the public but to the one/s in the vehicle too and may lead to an accident.

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[424] Case C-409/09 *Lavrador v Companhia de Seguros Fidelidade-Mundial SA* [2012] RTR 4.

[425] *Delaney v Pickett* (n 93).

[426] *Sian Pinn, Mr Huw Rhodri Bevan v Mr Jia Guo, Zenith Insurance Management Ltd, Mr Michael Vincent Palumbo, AIG Europe Limited* [2014] WL 12546268.

6.5. The impact of the Exclusions on Legal Certainty (Illustrative or Exhaustive)

As Member States are obliged to take into account the MVID's aim when legislating to ensure certainty, the need to know the effect of the MVID on the exclusion clauses in respect of third-party victims become necessary as to decide whether the exclusion clauses are listed to be illustrative or exhaustive? It is not certain as to say it is an illustrative ones, which may lead to the permission of other exclusion clauses that Member States or their insurers may use to avoid liability towards third-party victims. However, if the exclusion clauses listed under the MVID are to be deemed as an exhaustive, that would prevent Member States as well as their insurers to produce their own exclusions in order to avoid liability towards third-party victims, but they can only use the exclusions permitted by the MVID.[427] That would mean certain exclusion clauses are not to be used against third-party victims anyway. The MVID is not clear whether or not to permit other exclusions other than the listed ones. However, the EU stated that the exclusion clauses listed under Article 13 of the MVID are exhaustive, but nevertheless, other exclusion clauses shall not totally prevent third-party victims of their right, but to shift the responsibility to the compensatory body required under Article 10 of the same Directive (to deem the vehicle as uninsured) where the incident takes place. In either way third-party victims must not be left uncompensated or otherwise that may undermine the protective purpose of the MVID. Member States may need to regard the exclusion clauses listed under Article 13 of the MVID as a minimum requirement, and other exclusions may be only considered in respect of the first, not third-, party victim. The CJEU later clarified that the issue surrounding the permission of other exclusion clauses that no other exclusions can be used against third-party victims (see for example, *Bernaldez*).[428] In other words,

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[427] Article 13.

[428] *Bernáldez* (n 238). The case is the first one to be examined by the CJEU, in respect of the scope of the exclusions under the MVIDs.

the Court regarded the exclusion clauses listed under Article 13 as illustrative of what cannot be use against third-party victims (unlike what one may understand from listing certain prohibited exclusions to believe that others are permitted). In this respect, unlike exhaustive exclusions, the illustrative ones can be used as a guidance by Member States to work into line with the protective purpose of the MVID by for instance, using *Marleasing*[429] to impose similar prohibited exclusions when it comes to third-party victims' rights, and to ensure consistency across the Community. Failure to prohibit exclusion clauses that can be imposed by Member States may lead to limit third-party victims' right for compensation, which will lead to different level of cover depending on where the accident takes place. Such disparities oppose the uniformity across the Community that the MVID aim to achieve. Therefore, third-party victims' right must be ensured fair compensation, either by insurers or the Compensatory Body, regardless.[430] Back to UK national law, the law is not certain in this respect as to limit insurers' rights of applying exclusion clauses other than the that stated in Article 13 of the MVID. The law does permit more exclusion clauses where insurer used and still capable of using to undermine third-party victims' rights enshrined by the MVID.[431]

6.6. The European Principles of Equivalence and Effectiveness

It is true that there is another route for compensation for third-party victims to follow (where insurers succeed to avoid liability) but the question here is whether the scheme managed by the MIB offers fair trial and compensation as fair as the one which is directly sought through insurers or the MIB relies, under its Agreements, on unfair and unjustifiable rules and procedures to undermine victims' right for compensation? Yet, the UK's compensation scheme, which is supposedly designed

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[429] *Marleasing* (n 254).

[430] Subjected to the only permitted exclusion clauses under Article 13 of the MVID.

[431] See Chapter Four.

to protect third-party victims of uninsured/untraced drivers, cannot be deemed to be fully implementing the MVID, and it would be a potential point for future disputes (the current compensation scheme is neither equivalent nor effective in this respect). The failure is due to technical knock-out clauses, conflicting provisions and unfair procedural rules that innocent victims face when they seek their claims through the MIB, which result in such claims concluded with less or no compensation awarded to victims at all.[432] The MIB's Agreement, when compared with the minimum standards required under the Community law, becomes clear that the level of protection available under the Agreement to victims of untraced/uninsured drivers is neither equivalent to that under the Community law nor under similar claims made against insured drivers. The MIB may argue that its Agreements comply with the MVID and the current differences are not so significant as to hold it (the MIB) to be in breach of the Directive. However, no matter how small the violation of the protection, the result is that the Directive is undermined by the Agreements. It entities it to avoid its liabilities where it occurs, which reflects the fact that the MIB neither works in the public's best interests but for its own, nor does it fulfil its duty to comply with the MVID, despite the minimum standards of protection for third-party injuries under the Directive being clear, precise and simple to follow. In *Factortame*[433] the UK government argued that the Merchant Shipping Act 1988 did not undermine the effectiveness of the Community law. The CJEU however, rejected the government argument and stated that such restrictions on persons (natural and artificial) violate Community law. Therefore, EU Member States must not undermine the MVID but ensure its effectiveness. In respect of *Bernaldez*[434] the CJEU stated that insurers can neither rely on contractual terms nor on national law in order to avoid a claim raised by third-party victims.

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[432] For more details see Chapter Four.

[433] *Factortame (No 2)* (n 8).

[434] *Bernáldez* (n 238).

Bernaldez[435] ensures the Directive's effectiveness to protect third-party victims of motor accidents and it could be applied to any accident falling under the MVID. Therefore, and in this respect, the UK, under EU law, is obliged to take into account the EU principles of equivalence and effectiveness[436] when dealing with claims made against uninsured and untraced drivers. Procedural rules imposed under the UDA 2015 as well as the UtDA 2017 must not deprive innocent third-party victims of road traffic accidents of their rights but to ensure the right amount of compensation is awarded.[437] In other words, to ensure effectiveness and equivalence in this respect, such claims shall follow the same procedural rules and get the same award had it been dealt and awarded by insurers, which is not the case, at least for now, under the current MIB' compensation scheme. Third-party victims shall not be disadvantaged as a result of being victims of uninsured or untraced drivers. For instance, in *Carswell v Secretary of State & MIB*,[438] it was clear that the claimant has faced an extra duty in order to secure compensation. Further, rights conferred on third-party victims of road traffic accidents under the MVID shall be respected even though there are no certain rules to govern that certain issue (see as well, *Evans*).[439]

Finally, the effectiveness and equivalence principle requires EU Member States to ensure that their implementation of any rights conferred on individuals under EU law to be effective and equivalent to rights conferred under other comparable proceedings. The UK, therefore, needs to apply the EU principles of equivalence and effectiveness in order to ensure the minimum level of compensation required by the MVID is met. Failure to do so will result in breach of one of the EU principles that

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[435] *Bernáldez* (n 238).

[436] Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECLI:EU:C:1999:14 at [32].

[437] Both Agreements were thoroughly discussed in chapter three and four, which are the ones governing uninsured/ untraced claims.

[438] *Carswell v Secretary of State & MIB* [2010] WHC 3230 (QB).

[439] *Evans v Secretary of State for the Environment, Transport and the Regions* [2001] Lloyd's Rep. I.R. 1.

is enshrined by EU Treaties. This is because the aim of the Agreements is to meet the MVID's requirements on behalf of the government, and as such it should be in a legal form that a layman can understand. However, the choice of unnecessary terms inserted in the Agreements, in respect of the procedural requirements, makes one believes that it is designed as traps, and not as a necessary legal requirement, which undermine the EU principle of the equivalence and effectiveness where a victim must not face unnecessary requirement to gain his right of compensation.

6.7. The European Convention on Human Rights Principle

6.7.1. Art 8

Article 8 of the European Convention on Human Rights states that

> *Everyone has the right to respect for his private and family life, his home and his correspondence... shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety…*

The Article aims to prevent public authorities from intervening in individuals' private life, where unnecessary intervention can amount to breaching the individual's privacy. In this respect, the MIB's requirement for a claimant to meet prior to his claim be processed is a clear breach of the Convention as it extends far greater than is necessary. For instance, the claimant must give consent to disclose his information from local authorities, the NHS, and even from his employers regarding medical history, past and present medical records, information regarding employment history and

disciplinary matters etc.[440] In *Leander v Sweden*[441] for instance, the CJEU stated that collecting and storing files about an individual's private life can fall within the scope of Article 8(1) of the European Convention on Human Rights. Further, in *Dudgeon v United Kingdom*,[442] the claimant believed that his private life guaranteed by Article 8(1) was violated when the police illegally interfered in his private life. The European Court of Human Rights held that the Irish Criminal Law Amendment Act 1885 breached the European Convention. The consequences of the successful enforcement of the case has led the law in breach to come into line with the EU legislation.[443]

To conclude, the MIB's Agreements breach third-party victims' rights of privacy when it requires victims to disclose information prior to proceeding their claims. Failing to comply with the MIB's requirement means that the claim would be rejected. The issue with the MIB' requirement is that the amount of information required for disclosure is unnecessary and cannot be justified (no equivalence to such requirement, neither under the direct claims to insurers nor under EU law).

6.8. Can the RTA88 be Disapplied? Case law 'Stare Decisis'

The principle that precedent is binding to later cases is called *stare decisis*. According to the UK legal system, case law establishes a principle or rule that can be binding on lower courts in the hierarchy due to the fact that the current case (the one arguing for the RTA88 to be disapplied) comes within the scope of the principle of law in previous decisions (which is *Factortame*[444] in this

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[440] For more detail, see Chapter One.

[441] *Leander v Sweden* (1987) 9 EHRR 433, at [48].

[442] *Dudgeon v United Kingdom* [1981] 4 EHRR 149, [1981] ECHR 5.

[443] By virtue of article 46 of the European Convention on Human Rights, the government must follow the final decisions of the European Court of Human Rights.

[444] *Factortame (No 2)* (n 8).

instance) and the decision that was made by the previous court is higher. In this part of the study the author will argue the disapplication of the UK's Motor Insurance law as the following;

6.9. The Hierarchy of the Courts

The Supreme Court stands at the summit of the English Court structure. This remains true but since the UK's membership of the EU, the UK has surrendered some of its sovereignty to the EU with regards the harmonisation of laws throughout the Member States.[445] Thus, with the development of the CJEU as the court of reference for Member States to ensure a consistency of approach, there has been an additional source of authority in EU law matters. It is unnecessary to explain how precedent operates with the CJEU. It is not the highest court in the Member States, that remains in the UK the Supreme Court, but Member States are required to follow its judgments to ensure a consistent approach as to the definition and operation of EU laws within Member States' legal systems (and this is particularly the case with regards Directives which require transposition and thus introduces an element of non-uniformity between the States' interpretation of the broad aims of a Directive).

In respect of *Factortame*,[446] it will be remembered that the House of Lords referred the case to the CJEU (the compatibility between UK and EU law) and the Court ruled that the MSA88[447] shall be disapplied by national courts.

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[445] Section 3(1) of the European Communities Act 1972.

[446] *Factortame (No 2)* (n 8).

[447] The Merchant Shipping Act 1988 s 12 was an Act of Parliament of the United Kingdom. It aimed to prevent foreign fishing fleets from fishing in British territorial waters.

6.10. Clarity and Precision of the Rules Breached

Returning to the MVID, the Directive's requirement, in respect of third-party motor insurance cover, is to meet the following; a) third-party cover; b) which is fit for purpose; and c) must be provided by insurers as a compulsory requirement for vehicles' owners to drive. The cover however, must not be restricted based on national law interests but to cover any use, that is consistent with its (a vehicle) normal function, made of any motor vehicle anywhere on land.[448] Nevertheless, the MVID does allow Member States to exclude from compensation a victim who let himself on a stolen vehicle and the insurer can prove that the victim knew it was stolen.[449] Furthermore, Article 10(2) of the MIVD clearly permits liability exclusion in this regard where Member States can prove that passengers knew the vehicle they voluntarily ride in was uninsured. The Directive's exclusion clauses are the only permitted ones, which makes any other exclusions illegal. For instance, the MIB breaches the MVID in its interpretation of the '*knowledge*' required to apply the Directive exclusions. The interpretation is still in breach of the Directive even after the House of Lords ruling in *White v White.*[450] The House of Lords interpreted the actual knowledge in this case to not enquiring about the legal status of the vehicle's insurance policy and whether the vehicle was legally insured or not. Therefore, if the claimant suspects and on purpose failed to act accordingly, then the exclusion applies. The author believes that there is no equivalent provision in the MVID and the exclusion is in clear breach of the Directive.[451]

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[448] Subject to certain exclusions and derogations as noted in Chapter Three.

[449] Article 3 of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability.

[450] *White v White* (n 128).

[451] For more detail, see Chapter Four.

The role of the MIB under Article 10 of the MVID is specific and precise. The Article defines its role, which is to achieve that set out in 3(1).

> *Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.*

Under the MVID, victims of road traffic accidents have the right to claim from the MIB (as the insurer of last resort), in cases where there is no insurance in existence. The UK meets this requirement through the MIB. But if the MIB is going to deny a claim based on certain rules that they themselves designed to serve their own interests and to allow, in cases of dispute, only one route to appeal which is also designed by them, it calls into question their role as (genuinely) an insurer of last resort.[452] The MIB jeopardised its legal position where and when it hardens the process for victims of road accidents to secure fair compensation, and its title of last resort may need to be changed or may be called an intermediate body before the last one which may result in the UK being in breach of EU law. That leads us to question another very important principle of EU law which is certainty which cannot be achieved where irrationality exists. For example, in *Evans v Secretary of State for the Environment, Transport and the Regions*,[453] the UK government was accused of breaching the Second MVID[454] to establish a compensatory body as the current MIB does not satisfy the requirement when the government privately agreed with the insurance industry to authorise the MIB to act as the compensatory body required under the Directive which resulted in

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[452] There are no review mechanisms, and how to examine and challenge evidence, which makes such compulsory arbitration unreasonable not only under the MVID but also under the UK common law.

[453] *Evans v Secretary of State* (n 441).

[454] Article 1(4).

many claims being denied. However, the CJEU held that the method of compliance with the Directives is a matter for national laws of EU Members States, which reflects the Directive's aim not to alter the civil law of Member States. Nevertheless, failure to establish the right compensatory body as required under Article 10 of the MVID would jeopardise the aim of the Directive to facilitate free movement as any other exclusion clauses that EU Member States attempt to permit would be in breach of the MVID.

The Directive is clear and precise about the rights conferred on third-party victims that Member States shall ensure third-party victims of road traffic accidents would not be left without fair compensation subject to those specific exclusions mentioned earlier. In spite of that, the UK's national law (the RTA88 and the MIB's Agreements) breach the MVID when it undermines the protective purpose provided under the Directive when it fails to provide the right protection by permitting more exclusion clauses that the MVID does not permit. The RTA88, for instance, in ss 143 (the duty to insure), 145 (third-party cover), 148 (limitations on certain exclusions), 150 (the use of a vehicle), 151 (4) (knowledge of the vehicle being stolen or unlawful taking), 152 (exceptions under s 151), 185 (definition of a motor vehicle), and 192 (definition of road or other public place) breach the MVID. It also does so under the MIB's Agreements when for example permit insurers and the MIB to avoid liability by imposing unfair exclusion clauses, limitations and restrictions.[455] The earlier mentioned sections and clauses breaches the clear and precise requirements of the MVID.

[455] For more detail, see Chapter Four.

6.11. The Degree of Excusability of an Error of Law

The transposition and interpretation of the MVIDs contain many historic and contemporary errors. Some can be justified as to many factors such as the requirements in some countries differ from another in the modern society, and the interpretation of EU case law and provisions can also be affected by judiciary's point of view based on their experience of each matter individually, and on the level of willingness to give effect to new sources of law (perspective). However, that does not justify the previous breaches of the MVIDs and now the MVID in this respect. Therefore, the UK government (here the Secretary of State for Transport) needs to remove all the breaches that undermine third-party victims' rights of uninsured and untraced drivers to have fair compensation through fair trial by working in line with the MVID. The government's failure is inexcusable and the UK is obliged to have the Directive transposed accordingly as far as it is a Member of the EU. The government, for instance, claims that third-party victims' rights of road traffic accidents are protected as the MVID requires. Such a claim is however untrue. It is true that a claim can be made under the RTA88,[456] and where there is no insurance in the first place or the driver was untraced then the extra-statutory mechanism (the Agreements) exists as an alternative. This is not always true as insurers based on certain exclusion clauses can avoid its liability against third-party victims in accident involve a vehicle that was insured in the first place but now as a consequence of applying an exclusion clause the accident has no cover anymore, and when referred to the MIB as last resort, the claim is excluded too based on unlawful exclusion clauses applied by the MIB that undermine the protective purpose of the MVID (see for instance the case of *EUI Ltd v Bristol Alliance Ltd Partnership).*[457]

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[456] Section 151 of the RTA 1988.

[457] *EUI* (n 243).

In other words, it is true that the MVID gives a wide discretion on how to achieve its objectives, the discretion is however conditional that the objective set out by the MVID must be met otherwise the State that does not meet its duties would be considered in breach of the Directive. The MVID is clear in this regard to have third-party victims protected regardless of any other circumstances subject to the exclusions permitted by the Directive.[458] In spite of the fact that the UK has no discretion to prevent third-party victims of their rights but to be bound by what the MVID States, it does so in an inexcusable manner. Moreover, in *Ruiz Bernaldez*,[459] the CJEU held that EU Member States would have no choice to imply any exclusions that contradict the Directive. It means as well that judgments issued prior to 1996, which were decided based on unlawful exclusion clauses must to be considered as unfair to victims who suffered loss because of a reluctance to apply the Directive. However, some (such as the MIB) may argue that mere infringement of the Directive is not sufficient to meet the required criteria for a claim to be sufficiently serious. Nevertheless, the limitations, restrictions and exclusion clauses implied in the MIB's Agreement as well as the procedural rules, do not only harden third-party victims to access justice, which breaches human rights to have access to justice,[460] but it, in many case, deprives third-party victims of their rights which contradict the MVID and become a source of legal uncertainty too.[461]

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[458] Which was discussed in Chapter Four.

[459] *Bernáldez* (n 238).

[460] Which was discussed earlier in this chapter.

[461] The principle of legal certainty was discussed in this chapter.

6.12. The State of Mind of the Infringer (The MIB and the Government)

In respect of EU Legislation, the government on 15 December 2010, announced Guiding Principles on how to implement EU legislation. It applies to the Directives[462] where Ministers are the ones in charge to transpose it accordingly however they best see fit.[463] The principles however, state that

> *… the government when transposing EU Directives shall ensure that… the UK does not go beyond the minimum requirements of the measure which is being transposed* [and] *ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a Directive.*

According to this statement, it is clear that any transposition shall be taken after determining the aim of each Directive and how to bring it in line with the relevant policy of the government with the Directive so that the government will not face negative consequences that may follow as a result of failing to implement a directive correctly by meeting the minimum requirements. Further, the government needs to bear in mind that the transposition shall not go beyond the minimum requirements of EU Directive to avoid creating unnecessary risk of infringements.

In this respect, the MIB and Secretary of State have both failed to meet their duties to implement the MVIDs. Every time the MIB comes with a new Agreement proves to be inconsistent and fraught with many exclusion classes and illegal procedural rules that makes the Agreement fail to meet the MVID's objective to facilitate free movement by redressing incompatibilities in previous

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[462] For instance, in December 2016 there were nearly 900 Directives in force, almost all of which apply to the UK.

[463] Once a directive has been transposed into national legislation, individual rights may be asserted with respect to third-parties and enforced in national courts.

Agreements, which cause uncertainty to the legal system too. The MIB, intentionally, ignores to remove inconsistent exclusion clauses included in its Agreement as some were challenged and enforced by Courts. For instance, in *Farrell*[464] where the passenger was sitting on the floor of the vehicle involved in accident was entitled to compensation under the MVIDs. The CJEU held that the 'passenger's status' in the vehicle is immaterial to deprive him from compensation. However, and although this case falls under the Irish MIB, the English MIB's Agreements are full of such unlawful exclusion clauses,[465] and yet to remove such illegal practices. Furthermore, in *Byrne v MIB & Secretary of State for Transport*,[466] a child was injured by an unidentified driver and the case to be dealt by the MIB. The three-year old child was denied his right for compensation by the MIB due to time restriction[467] that he has to submit his application within. The MIB tried to deprive the victim of his right for compensation in spite of the specific requirements of the Directive that such restrictions are not permitted by the Directive and it undermines the protected purpose of MVIDs. However, the Court held that the three-year time restriction under the UtDA 2003 breaches the MVIDs and the claimant is entitled to be fully compensation. Nevertheless, although the exclusion was removed from the last Agreement,[468] such removal is conditional as to the MIB's requirement. Further, the removal of such unfair restrictions lasted for ages and only removed in 2017 in spite of the early MVID requirement, which reflects the insincere intention of the MIB. Many of the national law's breaches have been challenged and successfully enforced by the CJEU, and other similar ones in other EU States were challenged and successfully enforced too. Yet the MIB and the

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[464] Case C-356/05 *Elaine Farrell v Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI)* [2007] ECLI:EU:C:2007:229.

[465] See Chapter Four.

[466] *Byrne v MIB & Secretary of State for Transport* [2007] EWHC 1268 (QB).

[467] Of three years period of time.

[468] The UtDA 2017.

government to comply with the MVID and bring wrong to right, which reflect one thing that both of which are not interested in doing so.

To conclude, going through the MIB's Agreement from 1999 and up to this date,[469] the author can claim that there is no good faith whatsoever in developing the legal system in this area of law to bring it into line with the MVIDs to facilitate free movement and ensure certainty. It is clear that by not eliminating defective parts of previous Agreement then there is no point of such indigenise work. Bearing in mind that a new Agreement that cannot make the law clear, certain, predictable and easy to be understood by lay people, it would not be considered as forward step but backward.

6.13. The Role of the Community to Ensure Compatibility (The Doctrine of State Liability)

There is no mechanism where the EU Commission can enforce Directives against EU Member States, but when a State fails to transpose a Directive correctly and by the deadline as required, then a State can held liable by individuals who have suffered negative consequences for the breach. However, and as mentioned earlier, the penalty that may apply to a State as a consequence of failing to work into line with the Directives is not an effective option as it does not correct the wrong by bringing it into line with the Directive but, to some extent, offer some remedy. Therefore, EU legislators may need to consider an alternative effective mechanism that can assure the right of individuals granted by the Directive are well transposed by EU Member States. EU Member States need to take into account the purpose of the Directive when legislating as its main goal for any changes to its national laws.

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[469] The UDA 1999, the UDtA 2003, the UDA 2015 and the UDtA 2017 as well as its amendments which followed each of which.

In the meantime, a State liability claim exists, based on the principle established in *Francovich*[470] where victims of road traffic accidents who become victims of a State's failure to implement the MVID properly can seek the route for compensation through a claim against their State for damages. For victims to follow this route, the Directive must confer clear and precise rights to the victim and the loss incurred, the relevant breach must be '*sufficiently serious*'[471] and the loss sustained must be as a direct consequence of the State's failure to implement the Directive. Nonetheless, this route of compensation can be costly in terms of time and money, which prevents some victims as well as practitioners from following it. In *Byrne v MIB & Secretary of State for Transport*[472] for instance, the CJEU held that the national law (precisely the UtDA 2003) does breach the second MVID. Therefore, the claimant is entitled for compensation and Member States shall not benefit from its failure to implement the Directive properly. Moreover, in *Delaney v Pickett*[473] neither side of the disputed parties tried to bring in the Directive and challenge the legality of the national law. However, the claimant later on, in 2015 brought the case under '*Francovich*'[474] where he succeeded to hold the government in *Delaney v Secretary of State for Transport*[475] in breach of EU Directive and secured compensation. Had the claimant not been aware of his right under the Directive, he would be left with no compensation at all. Generally, (apart of some cases such as *Churchill v Wilkinson* [2012])[476] the UK's courts do not seem to have much interest in giving reference to EU Directives as these may go against the well established rules in

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[470] *Francovich v Italian Republic and Bonifaci v Italian Republic* [1991] ECR I I-5357.

[471] *Brasserie Du Pecheur S.A. v Federal Republic of Germany, Regina v Secretary of State for Transport, Ex parte Factortame Ltd* (No. 4) [1996] ECR I-1029.

[472] *Byrne* (n 335).

[473] *Delaney v Pickett* (n 93).

[474] *Factortame (No 2)* (n 8).

[475] *Delaney v Secretary of State for Transport* (n 315).

[476] *Churchill v Wilkinson* [2012] EWCA Civ 1166, [2012] All ER (D) 47.

the UK constitution. Although the judiciary after *Ghaidan*[477] are to exercise statutory interpretation in order to give effect to Directives, they, however, have been reluctant to do so.

As stated earlier, the *Francovich*[478] test for any breach to be satisfied has to consider three factors a) there is a rule of law that was breached and the rule confers right on individuals; b) the breach of the rule was sufficiently serious; and c) there is a direct causal link between the breach and the loss or damages to victims as a consequence of the breach. However, that may count differently based on each case whether (i) the State failure to transpose EU Directive has deprived individuals of their rights conferred by an EU Directive; and (ii) the State has completely or partly failed to implement the Directive.[479] Nevertheless, although this route of compensation offers some sort of redress to third-party victims of road traffic accidents for poor implementation of the Directive, it is still beyond the required level as it does not fix the problem but it lessens its negative effect. Therefore, the right option that can fix the problem become necessary and urgent to avoid inconsistency.

To conclude, incompatibility with EU parent law (the Directive) has resulted in severe consequences for third-party victims of road traffic accidents. Some were left with less compensation for their losses and injuries, others were left completely with no compensation whatsoever (see for instance, *Bristol Alliance v The MIB and Delaney v Pickett*[480] before the claimant sought redress through the CJEU). Therefore, the new route to bring national law into line with the MVID shall aim to disapply those rotten illegal provisions and exclusion clauses alongside the unfair procedural rules. The author however, believes that the RTA88 (or the part in breach of

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[477] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

[478] *Factortame (No 2)* (n 8).

[479] *R v Secretary of State for the Home Department ex p. Gallagher* [1996] 2 CMLR 951.

[480] *Delaney v Pickett* (n 93).

the MVID) can be disapplied in the same way that the MSA88 was disapplied in the *Factortame*[481] case. The author believes that such step is crucial and inevitable as to bring the current national law (the RTA88) into line with the MVID to ensure free movement and certainly. The author claims that relying only on the *Francovich*[482] would not resolve the problem with no denial that it (*Francovich*)[483] provides some remedy to the problem. He, further, claims that such remedy can be deemed to be available only in theory for the majority of victims as they are generally not willing to take the risk through such route, which leaves them with no compensation whatsoever. For instance, Marson and Ferris[484] argued that State liability, as a means of redress or as an EU enforcing mechanism, has not achieved any success to compel EU Member States to comply with EU law. However, the authors do not deny that it has some sort of remedy but they believe it is extremely limited. The authors claim that only 22 cases were challenged in the UK, out of which only 9 succeeded to secure some sort of remedy. The earlier figures reflect how the EU mechanism State liability under *Francovich* is limited to only have 20 cases heard before the UK national courts in a period of 20 years since the mechanism took place, which supports the author argument of this paper. In other words, claimants as well as lawyers often seem to be either ignorant of the EU mechanisms for redress or they have little trust in it to be an alternative route for third-party victims' claims that their claims were denied due to breaches of EU Directive. In either way, the real victims are third-parties as they will be left with less or no compensation whatsoever. Therefore, the real solution is the permanent one, the one that unroots the issues by disapplying the law in breach once and forever.

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[481] *Factortame (No 2)* (n 8).

[482] ibid.

[483] ibid.

[484] Marson, J. and Ferris, K. 2020. The Compatibility of UK Law with the Motor Vehicle Insurance Directive: The Courts Giveth… but will Brexit Taketh Away. 136 *Law Quarterly Review* 35.

6.14. Disapplying the RTA88, UDA and UtDA: The Constitutional Argument

It will likely be questioned in the first instance why, in 2019, is an argument being presented to use a case established in 1991 to give effect to superior EU law in the courts of a Member State. Surely the brightest legal minds will have considered, and by implication rejected, such an argument. I write this because naturally this is the 'elephant in the room' and without addressing it from the outset, it will play on the minds of the reader and possibly distract from the opinions presented. If one begins by examining the constitution upon which the United Kingdom is based, one of the first theorists that springs to mind is Dicey who, as famously instructed to all first-year law students, concluded that the sovereignty of Parliament is supreme – limitless – and therefore it may make and unmake any laws which it chooses. Significantly, 'no person or body is recognised by the law… as having the right to override or set aside the legislation of Parliament.'[485] Thus, the legal power vested in the country is qualified by a political reality and this, for Dicey, is the only hierarchy in place. There is, of course, a hierarchy in existence within the sources of law which will be seen between Acts of Parliament, the common law, conventions and customs. This is natural. However, the issue is that for Dicey that the Acts themselves are of the same legal power and significance. He does not seek to establish a hierarchy amongst them. Given the flatness of the structure proposed, the legal status of each Act of Parliament is the same.

This view of the legal landscape in which primary legislation exists fails to take into account the development of our legal system, and of what at least became known as constitutional statutes – those which were so fundamental that they could not be, implicitly at least, reversed through implied repeal. Thus, whilst they became entrenched in our legal system there remained the possibility of an explicit repeal by a future Parliament if indeed the political will allowed. The

[485] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* [1885] (Macmillan 1959), ch. 3.

Constitutional Reform Act 2005, the Human Rights 1998 Act and, especially for the purposes of this thesis, the European Communities Act 1972 were each examples of Acts of Parliament which had the status granted to them of moving beyond 'ordinary' Acts and becoming 'constitutional'.

We can therefore move forwards on the basis that whilst Parliament and its law-making remains supreme, the content of the laws it produces are subject to a hierarchy in which some Acts have greater powers and significance than others. To begin, it is important to recognise the fundamental impact that the case *Factortame* had on the legal system, the rights of individuals within the Member States of the European Union (EU), and the obligations facing Member States and the supremacy of EU law over inconsistent national law.

6.14.1. Supremacy of EU Law: A National Courts' Duty?

National courts of EU Member States have a duty to ensure that the principles of Community law are protected. According to Oxford dictionary of law, Community law is defined as:

> *The laws of the European Union (as opposed to the national laws of the member states), It consists of the treaties establishing the EU (together with subsequent amending treaties), Community legislation, and decisions of the European Court of Justice. Any provisions of the treaties or of Community legislation that is directly applicable or directly effective in a member state forms part of the law of that state and prevails over its national law in the event or any inconsistency between the two.*

The definition clearly states that EU law is the highest legal authority for EU Member States and no national law has the right to undermine the sovereignty of EU law. National courts, as a

consequence, are obliged to follow and apply the legislation of the highest authority regardless of inconsistencies in national law and legislation. Lord Denning's statement in *Macarthys v Smith*[486] reflects the surrendering of sovereignty to the EU through s 2 ECA 1972. However, the surrendering was a voluntary act of Parliament and one which it could override if it should so choose. He stated

> *If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.*

Consequently, unless explicitly provided for in the text or preamble of an Act, Parliament's intention when it legislates is to follow and, if applicable, to give effect to EU law. As demonstrated in *Unibet (London) Ltd v Justitiekanslern,*[487] for instance, many authorities were provided where EU Member States are obliged to give effect to the Community law and to ensure that rights conferred on EU individuals by these laws are protected. Therefore, and to do so, national courts must work in conformity with EU law and take into account the purpose of EU legislation to ensure compatibility and a constancy in approach. Further, in *R v Transport Secretary Ex p Factortame Ltd (No.2)*[488] Lord Bridge stated that the ECA 1972 is clear that EU Member States shall give priority to Community law where there are conflicts with national laws. National courts cannot compromise on individuals' rights, or permit any breaches to EU principles. Moreover, Lord Harwich held that Community rights conferred on EU citizens were to be protected by national courts and could be, in

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[486] *Macarthys Ltd. v Smith* [1979] 3 All ER 325 at [329], paragraph 11 of Professor Hartley's written statement.

[487] *Unibet (London) Ltd v Justitiekanslern* [2007] CMLR 30.

[488] *Factortame (No 2)* (n 8) at 659B.

these circumstances, directly enforced. In this respect, the courts in Member States are not allowed to undermine Community law by, for instance, preventing its effectiveness. To give effect to this principle, national courts were able to set aside any rules that undermine the effectiveness of EU law and were to enforce the Community law.[489] However, in regard of an award for damage to victims of a State's failure to implement EU law as required *(Francovich),*[490] *Evans v Secretary of State for the Environment, Transport and the Regions*[491] clarified that such award is only granted conditional on the satisfaction of three conditions (i) the law in breach shall grant individual direct right in regard of the disputed area; (ii) the breach shall be sufficiently serious; and (iii) the loss to the victim was the direct consequence of the breach by the State (the loss was due to direct failure of implementing EU law).

6.14.2. The Tri-Partite Test – The Limiting Factor

When using the tri-partite test and applying it to the MVID, it is possible to identify the granting of rights to individuals. It was in *Delaney v MIB*[492] where Jay J held that the MVID satisfied the tests and allowed the claimant to recover damages from the UK. Typically, it is the second test which limits the success of recovering compensation. It is trite comment and the arguments are well rehearsed elsewhere but essentially Member States were to be protected where they had breached EU law, and this had caused the claimant quantifiable loss, but this had been the result of an innocent mistake or administrative error. It would be unfair to hold a State liable for each loss sustained by claimants in such circumstances, particularly when the CJEU was placed as a court of

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[489] Article 5 of the Treaty of Rome.

[490] *Factortame (No 2)* (n 8).

[491] *Evans v Secretary of State* (n 441).

[492] Unreported, but noted in *Delaney v Secretary of State for Transport* (n 315).

reference to determine any error and offer more clear and purposive instruction as to the point of law or the interpretation that should have been used by the court. The result was the 'sufficiently serious' element of the test which negated the efficacy of the remedy of State liability. Of course in relation to the MVID, the breaches of EU laws and principles in national law have often been so flagrant and clear that they pass the threshold for establishing the State's liability. Nevertheless, and as mentioned earlier, even though *Francovich*[493] offers some method of remedying the financial losses suffered by the claimant, it does not correct the wrong (the breach) by bringing the national law in breach into line with its EU parent. Consequently, the victims who choose not to seek this route of remedy would suffer the negative consequences of being left uncompensated, which opposes the protective purpose of the MVID to facilitate free movement of people and goods throughout the Community.

6.14.2.1. Key Cases and the Development of the Constitution

It is unlikely to be controversial to comment that one of the most remarkable movements in the history of the EU was the CJEU ruling in *Von Colson and Kamann v Land Nordrhein-Westfalen.*[494] Here the court empowered national courts to interpret its laws rationally in accordance with the wording and the aims of EU law. The EU had created, it will be remembered, a 'new legal order' in which EU law was superior to national law which was a principle establishing the indirect effect of EU law.[495] In *Marleasing*,[496] the CJEU instructed the courts of Member States that they should, as far as is possible, interpret national law to give effect to the content and spirit of the EU parent. This

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[493] *Factortame (No 2)* (n 8).

[494] Case 14/83 *Von Colson & Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

[495] See as well *Marleasing* (n 254).

[496] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

philosophy was furthered in 2004 with the Court's ruling in *Bernhard Pfeiffer et alia v Deutsches Rotes Kreuz, Kreisverband Walshut eV.*[497] Here those same national courts, it was emphasised by the CJEU, should play a greater role in protecting individuals' rights conferred on them by EU laws when interpreting national law. Concurrently, national courts were charged with not preventing any provision from undermining the purpose of the MVID.[498] These cases established that, even prior to the UK joining the EU, EU law was accepted (and had to be accepted by new entrant States) as superior to national law. Without such a ceding of sovereignty the legal system of the EU and the development from an economic community to a union of States would not be achievable. The States, in ensuring EU law was superior to national law would have their rights to establish new laws in contradiction of EU law curtailed. When interpreting and applying existing laws, which either were created to transpose the effects of secondary sources of EU law (Directives) or could be interpreted as being affected by an EU law, the courts in those jurisdictions had a positive duty to give effect to the EU law (direct parent law or not). Even with the duty of purposive statutory interpretation applying to national / EU law, numerous examples have been presented in this thesis where national courts have adopted a holistic approach and concluded that, on the whole, national law conforms with the requirements of the MVID (see *Roadpeace*).[499] Therefore, the value of the *Marleasing*[500] / *Pfeiffer*[501] line of reasoning in establishing a consistent interpretation of national law in light of the MVID has been haphazard and has not produced any semblance of legal certainty for any of the parties to motor vehicle insurance law. While much of this thesis and this chapter uses cases where the national court has failed to interpret national law consistently with the MVID,

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[497] *Pfeiffer* (n 381).

[498] See for instance, Case C-129/94 *Ruiz Bernáldez* [1996] ECLI:EU:C:1996:143 and *Elaine Farrell v Alan Whitty* (n 466).

[499] *Roadpeace* (n 231).

[500] *Marleasing* (n 254).

[501] *Pfeiffer* (n 381).

positive examples do exist. For instance, in *Churchill v Wilkinson*[502] for instance, the court did interpret national law[503] in accordance with the MVID.

However, the UK judiciary too often seem unwilling to consider EU law when establishing a ruling, which leads to an inconsistent interpretation between the two laws and which in turn undermines the protective purpose of the MVID.

6.14.2.2. The Thoburn, Factortame, HS2 Triumvirate

If an argument is to be made that it is perhaps necessary, and possible – both legally and politically – to disapply the RTA88, UDA and UtDA in areas where they breach the MVID, it is right to begin with the case which established the change in the constitution. The UK does not possess a constitutional court, its constitution is uncodified and subject to change, and the separation of powers does not grant a right for any court to strike down legislation. These facts are an established feature in UK constitutional law.

6.14.2.2.1. Factortame

The problem began when Spanish owned vessels started overfishing in UK territorial waters. Under the Treaty of Rome, the free movement principles enabled EU citizens to enter another Member State with the intention of working. The Spanish fishermen were such individuals. They had started by fishing and selling their catch in their home country, but soon discovered that other fish which did not sell particularly well in Spain did have a market in the UK. This lead to the influx of new

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[502] *Churchill v Wilkinson* [2012] EWCA Civ 1166, [2012] All ER (D) 47.

[503] Section 151 (8) Road Traffic Act 1988.

entrants to the fishing market in the UK and local fishermen were concerned about their livelihoods. It has to be remembered that these fishermen were fishing around the ports in the South of the country and these were traditionally Conservative-voting constituencies. With a threat that these areas would change their political votes, especially having seen what the Conservative governments had done to the coal and steel industries in the North of the country, the Government was faced with a problem. Should it follow EU law and continue to allow the Spanish (and citizens from other Member States) fishermen access to the waters and the fish, or should it establish legislation to curtail the influx? The result was the Government ceding to the pressure by the national fishing lobby and enacting the Merchant Shipping Act 1988 (MSA88). The MSA88 imposed conditions on those who wished to fish in British waters. Either the fishermen had to be domiciled in the UK or the vessel itself had to be registered in the UK. This would effectively limit access to fishermen from other Member States who would be unlikely to wish to satisfy those criteria. Of course, the Act contradicts one of the most important principles of the Community (the free movement principle). The case[504] was referred to the House of Lords who believed that such intervention may subvert the concept of Parliamentary sovereignty as the MSA88 was approved by Parliament.[505] In turn, the Lords referred the case to the CJEU. That Court declared that the MSA88 breached EU law and as the law of EU is supreme,[506] interim relief was necessary and the UK chose to disapply the Act accordingly.[507]

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[504] The case was brought by Spanish company Factortame Ltd and almost 100 other Spanish fishing companies. They are claiming for losses while their ships were laid up over three years from 1988-1991.

[505] The case sparked a debate on whether the constitutional principle of parliamentary sovereignty is being eroded. However, Lord Woolf, Master of the Rolls, sitting with Lord Justice Schiemann and Lord Justice Robert Walker, ruled that 97 owners and managers of vessels were entitled ‘in principle’ to claim damages.

[506] Section 2 (1) and s 2 (4) of the European Communities Act 1972.

[507] Three years later the Court of Justice overturned the UK's legislation. It also ruled Member States must pay compensation where a breach of European law was deemed sufficiently serious.

Prior to *Factortame,* it was understood that national courts have no power to strike down any legislation passed by the Parliament. The role of the courts is to interpret the law, not to make it.[508] However, and although the CJEU empowers national courts of EU Member States to read and interpret legislation in a way that gives effect to EU law through consistent interpretation and methods of reasoning to ensure consistency in the Community, such empowerment is still limited in the UK and any interpretation must not go against the spirit of the UK legislation, in spite of the fact that *Factortame* is a British case. Nonetheless, this may raise another question of the constitutional position of the courts as its interpretation of EU law may lead it to either overrule Parliament or to disregard EU law in a case of irreconcilable differences between the two laws. The ruling in *Factortame* provoked outrage as to how it undermines Parliamentary sovereignty.[509] The government however, was not ignorant[510] of the fact (as is also the case in matters related to third-party victims of road traffic accidents) that any legislation that undermines any principle of EU law such as free movement is a clear breach of EU law, which the UK is legally bound by, and negative consequences may follow as a result of passing the MSA88. However, the government's challenge to the Court of Appeal was dismissed, and the House of Lords stated that the disapplication was due to a breach of one of the most important principles of Community law, and therefore justified in the circumstances.

The MSA88 holds a unique place in the history of the UK constitution being the only Act which the courts would not apply. It was for Parliament to determine whether the MSA88 as it was written should be applied. If it was the intention of Parliament to breach a fundamental principle of EU law,

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[508] The House of Lords refused to rule on this matter as it may subvert the concept of Parliamentary sovereignty and referred the case to the CJEU.

[509] Adam Wagner 27 Jan 2011. Does Parliamentary Sovereignty Still Reign Supreme?' (The Guardian, 27 January 2011) < https://www.theguardian.com/law/2011/jan/27/supreme-court-parliamentary-sovereignty> accessed 11 November 2019.

[510] The law lords said the government had deliberately decided to run the risk of introducing the legislation, knowing that it could be unlawful. Justice required that the wrong should be made good.

it was able to do so. Adopting Denning's position in *Macarthys v Smith,*[511] the national courts would follow Parliament's instruction to adhere to the national law even where it was in conflict with a superior EU law. The EU law in question was only superior in the instance of the MSA88 because Parliament had instructed the judiciary of this point in the ECA 1972 s 2, [512] and Parliament was equally empowered to revoke this instruction in relation to the MSA88 or generally to all laws if it chose. The Lords had decided that such a fundamental breach could not have been the intention of Parliament and they held accordingly. They directed that aspects of the MSA88 which were incompatible with directly effective Community law should be disapplied.

6.14.2.2.2. Thoburn

It will be noted that one of the most significant features of the *Factortame (No. 2)*[513] case is that despite the importance that it has for the UK and its relationship with the EU, there is a general lack of detail and discussion on the constitutional theory and practicalities of, on the one hand, the principal of parliamentary sovereignty, and on the other the supremacy of EU law. It was not until 2002 in the *Thoburn*[514] case where the reasoning of the court shed light on this particular issue. The case was widely known and considered at the turn of the new millennium. Council Directive 80/181/EEC had established the requirement for goods widely sold (exceptions were incorporated in the directive but do not require consideration for the purposes of this chapter) to have the legal units of weight represented according to metric measurements. The Directive further allowed for supplementary indications of measurements – essentially allowing Member States such as the UK –

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[511] *Macarthys Ltd. v Smith* [1979] 3 All ER 325 at [329], paragraph 11 of Professor Hartley's written statement.

[512] The ECA provides, by section 2 (4), that European Union Law is to prevail over inconsistent Acts of Parliament 'passed or to be passed.

[513] *Factortame (No 2)* (n 8).

[514] *Thoburn v Sunderland City Council* [2002] EWHC 195 [2002] 3 WLR 247.

to continue using the Imperial measurement until the end 2009. The incorporation of the Directive into national, amending legislation (the Weights and Measures Act 1985), led to four appellants, known widely at the time as the metric martyrs, who had been convicted of offences relating to the use of Imperial measurements. It was in the use of the 'Henry VIII' powers of the Secretary of State to amend the 1985 Act which was the focus of the appeal. The main argument was that the amendment to the 1985 Act had impliedly repealed s 2(2) of the ECA 1972 on the basis that the ECA 1972 established a general provision regarding amending legislation and the more recent 1985 Act was a specific provision. Laws LJ was not convinced with the legal basis the argument but, to provide certainty regarding the issue in case he was incorrect in his analysis, Laws LJ continued by examining the nature of the ECA 1972 and whether and how implied appeal through inconsistent provisions in later statutes might affect its standing. Previous authorities were discussed and the fundamental principles which are very well known and need not be replicated here were considered. The result was that Parliament and the legislature cannot bind future parliaments – the doctrine of implied repeal continued as a fundamental matter our national constitutional law.

However, Laws LJ went further. He remarked that implied repeal it is actually context sensitive and, as legislation could be 'ordinary' or of a 'constitutional' nature, implied repeal operates as it is known to do so in relation to ordinary legislation. With regards to Constitutional statutes,[515] these had to be treated differently. Therefore, at para. 63, Laws LJ considered:

> Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed,

[515] The Magna Carta; The Bill of Rights 1689; the European Communities Act 1972; the Human Rights Act 1998; the Scotland Act 1998 and so on would likely be considered 'constitutional' in nature.

> constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible.

The ECA 1972 is a constitutional statute, but the overriding nature of the UK's Parliament, it being sovereign, must surely work to resist any limitations on its own power. Perhaps Wade is correct and sovereignty is now a 'freely adjustable commodity.'[516] The answer seems to be found in the text of the ECA 1972 itself and the powers it provides the judiciary in matters of resolving conflicts between national and EU laws. In terms of implied repeal, the ECA 1972 is impenetrable to implicit repeal or contradiction, albeit still subject to the express repeal of a sovereign Parliament. Thus, *Thoburn* establishes a continuation of the theory of parliamentary sovereignty.

6.14.2.2.2. R (HS2 Action Alliance Ltd) v Secretary of State for Transport

The case involved the application of Directive 2011/92/EU and its imposition of decision-making in relation to, for the purposes of the case, the construction of the proposed high-speed rail network known as HS2. The Supreme Court was tasked with decided if the UK's approach to the process adopted in *HS2* was in compliance with the requirements laid down in the Directive. The mechanism used to give effect to the transposition of the Directive was a 'hybrid Bill' – one which begins life as a public bill, but which adds an additional select committee stage following the second reading in each House. It is at this stage where objections from those directly affected by the bill can raise issues and be heard. It was this mechanism which was scrutinised by the Court with the issue of the potential concern that this form of scrutiny may encroach into the relationship between Parliament and the courts (per Lord Reed). It transpires that Lord Reed did not consider

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[516] H W R Wade, 'Sovereignty – Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568 at 573.

there to be any constitutional problem with the manner in which the Directive had to be implemented in national law, but what was interesting was the obiter provided where he hypothesised what would have been the result *had* there been such a problem from the Directive.

Lord Reed surmised that had the Directive called upon the UK to adopt a system of close judicial scrutiny of a bill on its passage through Parliament, the aligning of EU law with national law would not have been as straightforward as the application of the doctrine of the supremacy of EU law. The doctrine derives from the ECA 1972 and matters regarding conflicts between constitutional principles must be resolved by national courts according to principles of national constitutional law. Further, *Factortame (No. 2)*[517] was of no use in these circumstances as the matter there was the breach of EU law following the enactment of an Act of Parliament, not the process of the making of national law and its compatibility with superior EU law. The conclusion to be drawn is that in *HS2*,[518] Lord Reed is explaining how the application of EU law in the creation and interpretation of national law is not merely subject to the existence of the ECA 1972, but rather includes many other dimensions to national constitutional law which may have an impact.

6.14.3. The Triumvirate

The three cases mentioned in this section of the thesis come together to form the basis for a legal argument that the directly effective elements of the MVID, where they are breached by the RTA88, the UDA and the UtDA may lead to the disapplication of those offending aspects of national law. In

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[517] *Factortame (No 2)* (n 8).

[518] *HS2* (n 392).

Factortame (No. 2),[519] the decision of the Lords to direct the disapplication of sections of the MSA88 was due to the ECA 1972 providing for EU law to take precedence over national law and the MSA88 Act not derogating from the constitutional powers of the ECA 1972. Had Parliament intended the MSA88 to take effect over the provisions contained in the ECA 1972 it could and would have explicitly done so. *Thoburn*[520] continues this approach of parliamentary sovereignty and pragmatic primacy of EU law by demonstrating Parliament's continued power to derogate from EU law, albeit when it expressly identifies its intention to do so. The problem with this approach, whilst theoretically sound, is that it begins to unravel when considered in reality. As has been demonstrated throughout the Brexit negotiations and internal wrangling in Parliament, it is not simply the case that the government can choose to remove parts of the ECA 1972 when it seems politically expedient to do so. There would also be the political fall-out from the EU itself, a breach by the UK of its EU obligations and a denial of the legitimacy of the action by the CJEU. As a consequence, while the position in *Thoburn*[521] is academically correct in as far as the UK's ability to derogate from its EU obligations and the primacy of EU law is concerned, practically, however, this is little than a theoretical construct. There also remains the very real issue of what type of statute will be necessary to override an existing constitutional statute. This calls into question issues of hierarchy between such laws and, as provided by Law LJ at para. 63, a 'specific' form of derogation will be required to achieve an 'inference of an actual determination to effect the result contended for was irresistible.' This will allow for protection against accidental or incidental derogation, but the interpretation of such will fall to each court to determine. What it does not achieve though, is reconciling the stark difference between traditional legal theory (*Thoburn*[522]

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519 *Factortame (No 2)* (n 8).

520 *Thoburn* (n 516).

521 ibid.

522 ibid.

reinforces the principle of sovereignty of Parliament and its legitimacy that specific legislation can derogate from otherwise entrenched legislation with the status of being 'constitutional' in nature) and political reality. The UK voluntarily acceded to be a Member State of the EU and to accept with this status the primacy of EU over national law in areas where the EU has competence. It is naïve to infer that Parliament may simply express a willingness to override the EU Treaty and for this position to be accepted by the courts. Although, of course, this is what the *Thoburn*[523] judgment appeared to suggest. However, towards the conclusion of his judgment, Laws LJ offers an interesting insight into a modernising of that constitutional view.

> [Parliament] Being sovereign, it cannot abandon its sovereignty... This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the UK's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.[524]

Here Laws LJ notes that Parliament's legislative authority derives from its common law roots and it is in the common law where it may be subject to modification. Therefore, as the common law is the source of Parliamentary sovereignty, it may also be used to alter what is known of as sovereignty. This, for Laws LJ at para. 60 of his judgment, has been ably demonstrated in respect of the creation of exceptions to the doctrine of implied repeal. It also permits, if such an argument is advanced to a natural conclusion, for the common law to decide, if it wishes, to create constitutional legislation which, through interpretation, are so important that it would be inappropriate for a Parliament to

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523 ibid.

524 ibid at [59].

nullify – implicitly or explicitly. The common law will thereby be the arbiter of what might be recognised as constitutional legislation or conversely of a lesser hierarchical standing. Hence the *Thoburn*[525] ruling is at times confused as to which authority (parliamentary or common law) determines the entrenchment of legislation. Ultimately, *Thoburn*[526] reflects a new view of the constitution. Here Parliament's sovereignty is not so much a 'political fact' in the Wade sense of its understanding,[527] rather it is a legal phenomenon subject to the common law it need not invoke unconstitutional behaviour on the part of the courts to produce a *Factortame (No. 2)*[528] and *Thoburn*[529] result. These cases are the very result of the courts 'discharging their constitutional role.'[530]

This brings us to the most recent case of *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*[531] (*HS2*). If we accept the proposition of Lord Reed in his *dictum*, the stark and binary distinction between ordinary legislation and constitutional legislation is too simplistic in approach. *Thoburn* established the distinction and hierarchy between ordinary and constitutional legislation, but left open the debate of whether all constitutional legislation is of the same status. Could there be nuances and hierarchies present in constitutional laws? This is the place where Lords Neuberger and Mance offered their reasoning on the matter by reference to:

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[525] *Thoburn* (n 516).

[526] ibid.

[527] H W R Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.

[528] *Factortame (No 2)* (n 8).

[529] *Thoburn* (n 516).

[530] Mark Elliott, 'Embracing 'Constitutional' Legislation: Towards Fundamental Law?' Paper No. 48/2014 August 2014, University of Cambridge Legal Studies Research Paper Series at p. 18.

[531] *HS2* (n 392).

> Article 9 of the Bills of Rights, one of the pillars of constitutional settlement which established the rule of law in England in the 17th century, precludes the impeaching or questioning in any court of debates or proceedings in Parliament. Article 9 was described by Lord Browne-Wilkinson in the House of Lords in Pepper v Hart [1993] AC 593, 638, as "a provision of the highest constitutional importance" which "should not be narrowly construed".

Thus some constitutional principles may be more 'constitutional' than others and could an EU Directive be constructed which would require national courts to set aside the principle due to the superiority of EU law? For Lords Neuberger and Mance the answer was that it probably would not. They seemed to misrepresent the House of Lords' instruction relating to the treatment of national law which contradicts EU law via the ECA 1972 (that such legislation was to be held as 'invalid' when really what the Lords held was that such laws could be dissapplied by the courts). However, they proceeded by explaining how the ECA 1972 could not be interpreted as meaning that all legislation, especially those dealing with, for example, the rule of law, which were in conflict with EU law could be abrogated.

The analysis of the above cases is used to demonstrate that the basic notion of the supremacy of EU law over inconsistent National law derives its status from the ECA 1972. This was established, if were needed, in *Factortame (No. 2)*[532] and through *Thoburn*,[533] the court further offered direction that the ECA 1972 was a constitutional statute and thus immune from implied repeal. For future legislation to override the principles of the ECA 1972 would have required specific and explicit

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[532] *Factortame (No 2)* (n 8).

[533] *Thoburn* (n 516).

repeal of those principles. More recently in *HS2*[534] the Supreme Court explained how constitutional laws – be they legislative or established through the common law – are not equal and a hierarchy exists. Thereby explaining a further nuance to laws which may be repealed and through which measures will be required. The ECA 1972 was deemed to have the status of being fundamentally constitutional in nature and therefore Parliament did not intend for future legislation to abrogate the principles within it lightly. If we return to *Thoburn*[535] it is readily evident that the RTA88 would be defined as ordinary legislation and would not require discussion of the hierarchy between constitutional laws. Essentially, the ECA 1972 trumps the RTA88, and using this analysis even more so in relation to administrative provisions contained within the UDA and UtDA, and it would follow that it is available to national courts to disapply those national provisions which contradict directly effective elements of an EU directive (superior EU laws).

Of course, the entire purpose of the discussion provided by Lords Neuberger and Mance is to further explain the very blunt constitutional tool which is Parliament's sovereignty enables it to abrogate and derogate from EU law in as far as it chooses, albeit with the proviso that it makes such an intention sufficiently transparent and obvious. The judgment of the Lords tempers this approach through categorisation of the ECA 1972 as being but one constitutional law which is potentially limited through the application of other constitutional laws – be they legislative or established through the common law. The status of the ECA 1972 does not credit it with a power to prevail over all other inconsistent Acts of Parliament, but it does offer the starting point for arguments regarding the hierarchy and status of laws and whether implicit or explicit derogation is necessary to determine the primacy of EU law. This rejects the previously held view that the constitutional

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[534] *HS2* (n 392).

[535] *Thoburn* (n 516).

landscape as provided for by Dicey is flat and introduces a more uneven constitutional order which will require calibration through judicial pronouncement.

6.14.4. Interim Relief or Permanent Disapplication?

There is no such power that can prevent the UK's national courts from granting interim relief or to permanently disapply the national motor insurance law otherwise such power would harm the effectiveness of EU law (see *Schorsch Meier GmbH v Hennin* [1975]).[536] The MSA88 was believed to be in breach of a fundamental EU principle (free movement principle) where individuals and businesses used to rely on to have the right to access to the UK fishing quota as free movement shall not be restricted. Aspects of the motor insurance laws are in breach of the same EU fundamental principle (free movement). The applicants in *Factortame*,[537] after an unsuccessful claim,[538] sought judicial review in the UK and to remove restriction on their rights of fishing in the UK water.[539] The judicial review, however, failed to achieve anything of substance. As the judicial order to restrain the government from the threat that the Act undermines EU law and to make restitution to the claimants was refused, the case was referred to the CJEU through the House of Lords.[540] Thereafter, the CJEU held that national laws of EU Member States should have no effect whatsoever beside EU law (national laws cannot prevent national courts from granting interim relief where EU law involved in a dispute).[541] The CJEU held that the provisions of the MSA88

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[536] *Schorsch Meier GmbH v Hennin* [1975] QB 416.

[537] *Factortame (No 2)* (n 8).

[538] The claim before the UK national law before referral to the European Court.

[539] Article 43 of the European Community Act 1972.

[540] The House of Lords was obliged, under Article 234 (ex 177) now Article 267 TFEU to refer the case to the CJEU.

[541] Case C-213/89 *R v Secretary of State for Transport Ex p. Factortame* [1990] ECR 1-2433.

contravene EU law and therefore to be disapplied by UK national courts.[542] In the light of the CJEU judgment, the House of Lords granted an injunction in favour of the claimant (*Factortame*).[543] The motor insurance law has been challenged and many claims have proven unsuccessful. Some were referred to the CJEU and some compensation was granted. However, it failed to remove the illegality of exclusion clauses and procedural rules. A judicial review failed too to bring the law into line with EU law.[544] Therefore, referral to the CJEU, if national courts failed to fulfil its duty and disapply the law, may need to be considered.

The MSA88 was disapplied by the UK national courts and the victims of the 1988 Act were duly compensated. Therefore, the author argues that the directly effective aspects of the MVID (Articles 3 and 10) require the offending aspects of the RTA88, UDA and UtDA shall be disapplied and third-party victims of road traffic accidents who suffered losses or injuries in the past and failed to secure fair compensation due to breaches of EU law shall be compensated accordingly. For instance, in *Factotame III*[545] the CJEU held that the European Commission can take actions against any EU Member States that could be liable for damages where it fails to comply with EU law. As explained earlier in this chapter, the motor insurance law breaches more than one fundamental EU principle. Each of which is sufficient to have the law disapplied (the provisions and clauses in breach).

In conclusion, as the UK's national court had the power to hold the application of the MSA88, which is an Act of Parliament and the highest authority in the UK, in breach of EU law and thus should be disapplied pending confirmation from Parliament as to the future of the Act, why cannot

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[542] *Factortame (No 2)* (n 8).

[543] The decision was made on 11 October 1990.

[544] *Roadpeace* (n 231).

[545] Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany and R (Factortame) v SS for Transport (No 3)* (1996).

the same court use the same power to hold back the application of certain unlawful provisions and exclusion clauses of the RTA88 (if not to entirely disapply the law) in the same way? The House of Lords, in case *Factortame*,[546] confirmed the supremacy of EU law over the UK national law. The EU, after the UK acceded to its treaties, has thereafter competence. Therefore, there are no legal barriers that prevent national law to remove or disapply these rules which are in breach of EU law. However, one (such as the MIB) may argue that but the Agreements are private contracts and not part of the UK law to be treated as other national laws. Such claim is not true as the MIB provides public serviced, has State power and State control,[547] which means that the MIB is a public organisation not private. Therefore, the Agreements are part of the UK's national law and not as the MIB claims (private contract) just to escape its duty to meet the Directive's requirements.

The author's final question in this respect is that, had the Spanish company (Factortame*)* not been aware of the breach of one of EU fundamental principle and the supremacy of EU law, and then challenge the legality of the MSA88, would the Act have been disapplied or still applicable (maybe) up to this date? Had the Act (MSA88) not been disapplied by the UK national courts after referral to the CJEU, EU citizens' rights of free movement in the Community, as the case in respect of third-party victims' rights, would be undermined. That reflects the necessity to challenge the UK's motor insurance laws and seek to disapply it. Furthermore, the breach of EU law in *Factortame*[548] cost Britain about £100m in compensation to the claimant Spanish fishermen. Therefore, the government may need to bring wrong to right before facing such a challenge in the future, including whatever subsequent penalty the CJEU might impose.

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[546] *Factortame (No 2)* (n 8).

[547] The argument about the legal status of the MIB is explored in Chapter Four.

[548] *Factortame (No 2)* (n 8).

6.15. Overall Conclusion

Motor insurance law is of great importance for the Community, which has great impact on individuals' movement (drivers, passengers and victims) in the Community, and to have civil liability cover against motorists to ensure that third-party victims of uninsured and untraced drivers are fully protected. Failing to have such cover against civil liability may have a negative impact on people to move in the Community as free movement would be undermined if people felt that protection required for movement is not in place, which oppose the aim of unity that the EU aims to achieve. The protection within the Community therefore, shall not be effected by or based on, for instance, where an accident takes place as far as it happened on the Community land. In other words, victims shall be disadvantaged as to have their claim in this Sate or that but to be equally treated in terms of the level of compensation provided as well as to follow fair procedural rules to bring their claims before national courts irrespective of any other factors.[549] The Communities' type of legislation to achieve such goal is through a Directive. EU Directives' main goal is to ensure that people moving through the Community are protected against any kind of loss or injuries that they may suffer as a result of motor vehicles accidents while moving within the Community. The Directives, which create the legal framework for this matter, are to guarantee that compensations are always available for victims of such kind either by directly claiming from the responsible driver, his insurer (if applicable) or where impossible, from the relevant compensatory body.[550] The protection required by the MVIDs for victims of road traffic accidents is to facilitate free movements and have a Single Market for the Community as its ultimate aim. Therefore, any failure on the first part (to provide the right protection for individuals) would have negative consequences on the second part (promoting free movement, the Single Market). The MVIDs, in this respect, set

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[549] *Bernáldez* (n 238) at [13].

[550] For more detail see Chapter Four.

out certain objectives for Member States to achieve with wide discretion on how to achieve the aim of the MVIDs. However, the MVIDs is also to ensure that Member States have very little margin of discretion when it comes to the exclusion clauses permitted by the MVIDs. Nevertheless, and as far as the UK is concerned, the government refuses the notion that the MVIDs can have a wide interpretation as such would mean that the UK failed to fulfil its duty to implement the MVIDs effectively, which may entail to bring *Francovich* in. However, some put the blame on the EU stating that the Commission failed to take any action in this respect to challenge the UK national law (see for instance, Lord Clyde's argument in *Clarke v Kato*).[551] However, neither the EC nor Member States denies that the exclusion clauses play a vital role as to assess the rate risk which determines the premiums paid by policyholders as the MVIDs does aim too to keep premiums to minimum, which becomes hard to achieve both at the same time without some concessions (to prohibit all exclusions and keep lower premiums). The MVIDs, nonetheless, does permit some exclusion clauses in certain circumstances.[552] The UK compensatory body (the MIB) however, does not stick to the exclusion clauses permitted under the MVIDs, but it does permit unlawful exclusions. Furthermore, the MIB threatens that they will increase premiums if its cover of uninsured and untraced drivers is to be extended, which makes it hard to have both targets achieved accordingly. In either way, Member States such as the UK is still obliged to provide the right protection required under the MVIDs to achieve the Directive's aim of free movement, which required the UK to stick to the exclusion clauses permitted by the MVID and to use the CJEU's interpretation as guidance for further clarification when conflict between the two legislations (the national and EU) occurs, bearing in mind that any breach of EU Directive is a breach of the free movement principle and source of legal uncertainty.

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[551] *Clarke v Kato* [1998] 233 N.R. 381 (HL).

[552] Now Article 13 of the MVID 2009.

Chapter 7: The Impact of Brexit and Beyond

7.1. Introduction

In this chapter the implications following the referendum vote in 2016, leading to the decision for the UK to withdraw its membership from the EU (commonly referred to as Brexit) are explored. This includes the UK's future relationship with the EU and its effects on the rights of third-party victims of motor vehicle accidents. If the UK ultimately chooses to leave the Single Market (through a hard Brexit) then there is no requirement for it to continue to be bound by rules established through the EU (there is no requirement to follow free movement principles). But, if the UK decided to pursue a soft Brexit and thus have access to the Single Market, the UK would continue to be subject to obligations created to facilitate the free movement principles - including the Motor Vehicle Insurance Directive (MVID) in its present form and a future, Seventh MVID. It would also require an amendment to the EU (Withdrawal Agreement) Act 2020 and require national courts to continue following the jurisprudence of the Court of Justice of the EU (CJEU). It may be anticipated that there will be a state of confusion present in the law and its future direction until this issue and the relationship between the UK and the EU is resolved. Nonetheless, there is presently, as pointed out in the previous chapters, a state of inconsistency between national law and EU law, therefore this is an opportunity to resolve many of these issues, either through continued membership of the EU, or through the withdrawal of EU law and a fresh Road Traffic Act and new Motor Insurers' Bureau (MIB) Agreements.

7.2. Brexit and Commentary

In this regard, with the exception of Marson et al.[553] no academic has written about the implications of Brexit on third-party motor insurance law. In their articles, the authors demonstrate how UK national law is heavily dependent on EU Directives to advance the rights of third-party victims of accidents involving motor vehicles. Therefore a hard Brexit, which seems to be the most likely outcome given the current impasse between the UK and EU negotiating teams, is likely to negatively affect these protective rights. The authors also believe that legal certainty, in at least the medium-term, will not be clear unless and until the British government and EU Member States decide what sort of relation the two partners will have in the future, especially in respect of the interference of the CJEU. They speculate[554] that after the Brexit negotiations come to an end, future interpretations will be necessary given that currently the Road Traffic Act 1988 (RTA88) ss 143, 145, 148, 150, 151(4), 152, 185 are in breach of the EU Directives. The authors admit that the implications are not clear, which will be an area for future research. With regard to *Vnuk*[555] the authors argue that the national law in s 185 is in breach of the EU Directives, but the completion of Brexit would have no major effect to the statute given that the Government has chosen to take no action to remedy the defect in the law, despite having accepted the result (in *Roadpeace*).[556] The authors expect that the EU may establish the Seventh Directive where the *Vnuk*[557] ruling will be reassessed to clarify the implication of the case in the future. Nonetheless the authors believe that

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[553] For example, see Marson and Ferris (n 486).

[554] Marson and Ferris (n 82).

[555] *Vnuk* (n 11).

[556] *Roadpeace* (n 231) at [88, 89, 91 and 98].

[557] *Vnuk* (n 11).

the UK may leave before the Seventh Directive takes place, which means the Directive will have no effect over national law.

Further, the authors believe that a hard Brexit will allow the unfair strike out provisions to continue in national law, and the chance for victims to challenge such disparities will perish if the Government fails to transpose the MVID in compliance before Brexit (which clearly it has no motivation to do). The separation between the EU law and the national law will entail the UK establishing a new Act and Agreements, which means the MIB will have more power to impose knock-out conditions that serve nothing but their own interest as there will be no mechanism to monitor or correct the future contractual relationships.

From the authors' point of views, it is clear that third-party victims of road accidents will suffer as a result of such a fundamental shift of their rights of protection, which they enjoy under EU Directives. However, the authors' discussion is limited as the future between the UK and the EU is not determined and their articles were written when there was an uncertain future given the precarious Conservative Government prior to December 2019's general election. Therefore, the second area for research that will offer a contribution to knowledge will be on this matter.

7.3. The Impact of Brexit on Motor Insurance Law

It is clear that the UK, from the beginning, adopted an inconsistent interpretive approach when it came to the MVID. Recent cases, however, have demonstrated a willingness on the part of the English judiciary to a more purposive approach to the MVID when interpreting national law, although inconsistencies in approach between the Court of Appeal and the Supreme Court still exist.

This may relate to misunderstandings on the part of members of those courts, or simply a reluctance to give much weight to the MVID given the shadow caused by Brexit.

The MIB may argue that the UK guaranteed that third-party victims of uninsured and untraced drivers would not be left without fair compensation, even before joining the Community (the UK had its own legislation in this regard before joining the Community). Therefore, people should not worry about leaving the Community. Nevertheless, it is true that there is compensation available under the UK's national law, but the level of cover under the MVID is more protective and generous when compared with the UK's law. Leaving the Community means to go back to the RTA88 and the MIB Arrangement in isolation, with no reference to EU law, and in so doing, third-party victims' rights will not be as protected, and many claims would be turned either entirely uncompensated or with lesser compensation in comparison to other claims of the same facts. However, this assumption is based on leaving the EU without reference to the EU Directive or the jurisprudence of the CJEU. The UK could decide, perhaps in light of the economic effects of the COVID-19 outbreak, to seek a close relation with the EU and accept some regulation of national law as a price worth paying. This would require alignment with EU motor vehicle insurance laws but if the UK chooses not to stay part of the Single Market, it will go back to the Green Card Scheme which would cause disruption to the traffic at the border as every single card will be required to be checked to ensure that the right insurance cover is obtained before crossing into the Community. In this respect, Huw Evans, Director of the ABI said that:

> As it looks increasingly possible that a no-deal Brexit may happen, we want all insurance customers to know the facts about what this means for them. If you live in Northern Ireland and drive to the Republic of Ireland, or if you plan to drive your vehicle to mainland Europe after a no-deal Brexit, you will need a Green Card to prove you are insured. You should

contact your insurer before you travel in order to get one. This advice applies to businesses as well as individuals.

Dean Sobers remarked '*Brexit presents a heightened risk of travel disruption, which means that disruption cover is more valuable to have*.' However, at the time of writing, and until the UK formally leaves the EU, it is worth reminding ourselves that both EU law and the jurisprudence of the CJEU have primacy over the UK law.

7.4. Will the UK Transpose a Seventh MVID After Leaving the Community?

Motor insurance law has a great impact on people's movement and depending on whether the UK is going to stay in the Single Market or not, the impact of the law will continue to require assessment. The Single Market aims to facilitate free movement of goods, capital, services and labour. However, there would have some positive elements if the UK decided to pursue hard Brexit where no further requirements for compliance with the MVID would be needed and therefore the law would, in some respects at least, become more certain. That would be at the expense of third-party victims' rights as the Directive is more generous in its protection, but there would also be little practical use in individuals and their legal advisors mourning for the loss of rights and protections which have no further impact domestically. However, hard or soft Brexit, remain or leave or to keep a close relationship with the EU after leaving are only matters which will be resolved at the conclusion of 2020 and it appears very unlikely that given this time frame either the Government will reverse the very policy which led to it winning the general election in 2019 (that of 'getting Brexit done') or that the Seventh MVID will have been completed and require transposition in this time.

7.5. Is the Government to Blame for Breaching the MVIDs?

Article 10 of the Consolidated Directive states that

> Each member state shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Art 3 has not been satisfied.

The chosen body responsible for ensuring compensation is available to third-party victims of uninsured or untraced drivers in the UK is the MIB. Its primary task is to ensure that victims of uninsured or untraced drivers are compensated to the minimum (required) level of compensation that they might secure had the driver causing the accident been insured and the claim was brought against an insurer. The Article clearly states that such responsibility is on Member States which, in other words, means that any failure (fully or partially) to comply with such a requirement would be counted as a State failure where the State could face enforcement proceedings by the European Commission (in its position as 'Guardian of the Treaties') where the recalcitrant Member State could be fined or even have its membership suspended until the requirements of the Directive are met. As explained earlier, the MIB is an emanation of the State and was tasked by the UK to occupy the position of national compensatory body to satisfy the requirements within the Second MVID. Consequently, the Government cannot claim that there is a compensatory body in place to deal with third-party victims' claims but that it should not be liable for any shortfall in the protection available to individuals where the Agreement it concluded with this body seeks to avoid such responsibilities as provided for in the EU laws. One may ask, if the Government was/is aware of its role (to comply with EU rules and regulations) and of its state of breach in meeting EU

requirements (the MVIDs in our case), then why it failed to step in to bring right to these wrongs, thereby ensuring compliance with the MVID.

The issue here is that the Government delegated (or perhaps more accurately it abrogated to the MIB) its duty, with no effective mechanism to monitor the way the MIB delivered such a duty to ensure compliance with the MVID. Furthermore, there is no or little option for the Government to influence the way the MIB deal with issues related to the MVID.

The issue that prevents the MIB from complying with EU Directives is that it is more generous in providing compensation to third-party victims of uninsured and untraced drivers where there are no restrictions on providing compensation under the MVID (per Article 3 of the Consolidated Directive) as the case that exists under the MIB agreement. The MIB Agreements, unlike the MVID, imposes many restrictions in comparison to the MVID where those restrictions narrowed the scope of cover provided by the MIB's Agreements to limit (or in practice) to undermine the purpose of the MVID. Therefore, if the MIB intends to comply with the MVID, it needs to remove all its unlawful restrictions, those which are not permitted by the MVID, and to widen the scope of cover provided to innocent third-party victims. The result of such compliance would mean more claims fall within the scope of its responsibilities and more money in compensation will need to be paid out to victims. Such a situation appears to be in opposition to the interest of the MIB as representative of the insurance body. The MIB represents insurers (businesses) that aim to make profits, as the case of any profitable organisation. Someone may ask, why the Government does not intervene and make the MIB work in compliance with the EU Directives? The answer is that neither the Government (or any other public body) nor other private bodies provide such a service, which leaves the Government with little option but to raise the issue with the MIB and to apply pressure where it can. But ultimately, the MIB could argue that such a move would result in an increase in

the premiums payable by customers (which would be unpopular), or it would exclude certain services (for example cover for other non-motor sports) or to them refusing to provide such service at all. The Government has no option but to comply with its (MIB) policy as alternatives are not available. One may ask what is the problem with increasing premiums if that would bring the national law into line with the MVIDs, provide better protection to third-party victims, and protect the State from State liability claims. The answer is that increasing premiums may lead motorists to drive their vehicles without insurance cover at all as to avoid paying an unrealistic price for such a service (motorists may break the law due to affordability). It would also indirectly affect the MIB. The MIB, under the MVID, only becomes the insurer of last resort where no policy of insurance cover is in place at the time of the accident. In all other circumstances (save for the one permissible derogation) it is the insurer which has to satisfy the claims of the third-party victims, albeit on the less favourable MIB Agreement terms. Promoting a situation of a greater number of motorists driving whilst uninsured would be contrary to the interests of the MIB itself. Therefore, keeping premiums at their lowest possible price is an important target that the Government would likely not sacrifice. The second option, where the MIB excludes other services such as sports and factory vehicles or in closed area vehicles (such as tractors) from the scope of its cover would now mean breaching the MVID following the *Vnuk* ruling. In other words, such an option will not bring the MIB's Agreements to work in line with the Consolidated Directive. The third option, where the MIB refuses to provide its service, would mean no a single vehicle can be driven on public land until the Government finds an alternative to the MIB's service (or agrees to satisfy those claims itself) as there would be no legal cover for any vehicle in the UK.

From the previous argument one can see the influence that the MIB has on the Government, which offers some explanation why the Government allows the MIB such scope in the formation of the Agreements. For example, the recent UK judiciary shift towards taking into account the

Consolidated Directive made the MIB apply for financial support from the Government, and motorists experienced some increases in their premiums. The MIB and the Government appear to enjoy a complex relationship, with third-party victims of motor vehicle accidents the unfortunate by-product.

7.6. The Impact of Brexit on Legal Certainty

Undoubtedly, Brexit has thrown up lots of uncertainties for almost every single aspect of British people's lives and of their future. One of which is third-party victims' rights in respect of road traffic accidents. The motor insurance industry is considering its options as to have some alignment regulations to keep traffic related rules as smooth as possible or to go back to Green Card scheme post-Brexit. The UK shares a land border with an EU Member State that can be controlled, with some negative consequences. Furthermore, the UK needs to renegotiate its position if it is to leave the Community as the ability to have free movement of vehicles with no border checks might not be authorised under the Community law. In other words, for the UK's vehicles to cross the borders of the Community after leaving it would mean that extra checks need to take place as the ability of the UK's motor insurance industry will not be recognised automatically, which leaves this area of law uncertain until the UK and EU decide on what terms the UK will leave. However, taking into consideration the uncertainty in the interim, the UK's insurance industry as well as policyholders may need to adopt a 'wait and see' approach.

The UK has been part of the Community for a long period of time, and as the ultimate goal of EU was to achieve the Single Market, which would not be achieved without harmonisation of rules relating to the free movement to remove any disparity of approach between the Member States, the UK in this respect, and to some extent, transposed much of the MVID into national law. Such

transposition to ensue certainty becomes itself a source of uncertainty as the type of relation with the Community is yet to be clear. Uncertainty, in this regard, exists as to whether the Government would adopt a soft-hard Brexit. If the UK is to leave the Community there is no further challenge that the MIB may face due to its current breaches of the Community law, which means the recent reference of the UK judiciary to EU law could be seen by others, such as the MIB, as outdated (see for instance, *Lewis v Tindale* [2019]).[558] Further, uncertainty would not be over once the UK decides to leave with or without a deal as the UK would be required to follow the CJEU interpretation as well as EU law (in our case the MVID) during the implementation period, which would not be clear until the first stage becomes clear. Plus, the UK would be a 'law-taker' during the implementation period with no say whatsoever in the direction of future EU legislation and policy, which would make the issue of legal certainty more complicated. Not to mention, the UK's intention to leave the Community becomes increasingly worrying for businesses who trade with the Community as free movement of vehicles are crucial for them. However, if the UK decided not to leave or left under what is called soft Brexit that means some elements of EU law (which must include the MVID) will be applicable. This would leave the UK in a precarious position as to choose to comply with Community law and face significant challenges to bring its law into line with the parent EU law. Nevertheless, unless and until Brexit becomes clear, its effect on this area of law remains uncertain.

In either way, whether the UK leaves or remains, third-party victims of road traffic accidents shall not be disadvantaged due to Brexit uncertainty. Legislatures may need to adopt (if the UK remained), or to incorporate the MVID (if they left). Reference to the CJEU judgments, in this respect, may also help to provide better protection for third-party victims of road traffic accidents and ensure legal certainty in case of remain option. Unfortunately, the *Marleasing*[559] principle,

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[558] *Lewis v Tindale* (n 278).

[559] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

which requires Member States to interpret its national laws in accordance with EU law may not be of great use as UK national law contains ambiguities and contrary instructions to those found in the MVID that give national courts room for an inconsistent interpretation with the MVID. Such requirements, to refer to EU law and adopt a purposive form of interpretation, may not work for the UK, which leaves no other possible option but to amend the RTA88 (in case of a remain option being exercised). Further, the approach of UK judiciary to adopt a case-by-case interpretation of the law may make it hard to ensure a consistent interpretation, which could be attributed to the lack of clear guidance for national courts to have consistent interpretation with EU law, that is if the national courts can, in the first place, refer to EU law. Such hinderances to harmonisation became more complicated and uncertain after Brexit.

Brexit will have another sort of impact on legal certainty as for the UK courts to consider referrals[560] to the CJEU means that there is a wait of some time (typically 18+ months) in order to hear back from the CJEU. This may go beyond the deadline of leaving the Community that was set up many times by the UK Government in the past few years and such a delay in the guidance from the Court in the interpretation of EU law will now be pointless and considered not relevant anymore.[561] Such uncertainty may prevent the UK judiciary to refer to the CJEU in this respect.[562] The first deadline for the UK to leave the Community[563] passed without a final agreement. The second deadline was passed too without any progress,[564] which made the case more complicated

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[560] Article 267 TFEU requires Member States to refer to the CJEU for preliminary interpretation in case of ambiguity.

[561] The average waiting time for the European Court's interpretation is up to 16 months.

[562] The uncertainty over Brexit is not only in this area of law but on many different aspects of British lives, which will continue throughout the negotiation period specifically the insurance industry in general.

[563] Originally to leave on 29 of March 2019.

[564] 12 April to reach a consensus.

and harder to predict. The EU leaders warned that the new deadline shall be final[565] (albeit it took the general election in December 2019 for the final date of 31 January 2020 to be passed by Parliament and agreed with the EU). Since this official withdrawal from the EU, the UK was given 11 months in its transition to form a new agreement, or at least the starting point for which further agreements could be reached, on the future relationship with the EU. This has been stalled for many reasons, which gives the possibility of either the UK leaving with no agreement at the end of 2020, or the UK requesting an extension of 12 of 24 months to continue the transition and to finalise this agreement. At the time of writing, both options seem equally plausible given COVID, the economic crisis that has emerged from it, and the concern by businesses already faced with applying social distancing measures to the re-opening of their premises. They will likely lobby the Government to continue the UK's membership of the EU for the next couple of years until the return of some form of normality (or a new normality).

7.7. Concluding Remarks

The real impact of Brexit is yet to be seen. However, the law in this area became more uncertain after the 2016 referendum as to how third-party victims' rights of road traffic accidents will be protected in the future. Nevertheless, Brexit is not the only source of legal uncertainty in this area of law, the Government and MIB had largely failed to effectively transpose the requirements of the MVID into national law long before the referendum in 2016. The Government, undoubtedly, is not going to embed any of the Directives or the CJEU judgments into national law. They, reluctantly, met some of their obligations under EU law, and in most cases to the minimum possible level, so it is difficult to believe that the Government is going to apply the law effectively once free of its Community obligations. One may argue that the UK does not need to have its motor insurance law

[565] 31 October 2019.

in line with the EU, but could go back to what is called the Green Card Scheme. The issue with this Scheme is that every single vehicle would need to be checked to ensure that there is an insurance in place that meet the legal requirements required under this Scheme, which may lead to queues at the UK-EU borders which would have negative effects on the UK economy (as this would also require lorries and other transportation vehicles to be subject to checks). Therefore and to avoid such undesirable consequences, the UK may still need to have its law, at least in this respect, in some form of alignment with the EU, which means the MIB would not be able to impose exclusion clauses that undermine the protective purpose of the EU Directive and keep compensating victims at the level required under the Directive. The Government needs to take a step forwards and reform the RTA88. It will need, as a minimum, to remove the unlawful exclusion clauses that exist.

Finally, leaving the Community does not mean that there is no need for a re-evaluation in this area of law. If the 1972 Act of the European Community is to be repealed, the protection provided by the Directive can still be used as guidance to protect British people, and it shall be for the Government to match other civilised countries' level of protection. We should not forget that the UK led the way in establishing the MIB (a national compensatory body) and was the inspiration for the first MVID.

7.8. The Consultation Survey and the Impact of *Vnuk*

The Government and the MIB did not agree with the CJEU's interpretation of the MIVD and the extension of compulsory motor vehicle insurance to private land. In consequence, it operated an online consultation survey on what would be the best course of action that should be taken following the *Vnuk* judgment.[566] The consultation ran between 20 December 2106 to 13 April 2017 after the extension of its origin deadline of 31 March 2017. The UK Government aimed to use the

[566] *Vnuk* (n 11).

consultation document to find out what options were available for it after *Vnuk,*[567] whether or not the Government shall act in accordance with the MVID to bring its national law into line with the parent Directive, and what the implications the case has for national law. However, the implications, irrespective of the results of the consultation process, have been affected by a series of confirming, and even extending, case law which makes certain of the *Vnuk* ruling. For now, it is clear that the UK has to amend its national law and ensure that third-party victims of motor vehicle accidents have access to fair compensation in all circumstances as required by the MVID, which means that motor vehicles 'intended or adapted for use on roads' and used only on 'roads and public places' are not acceptable anymore and must be amended to, for instance, cover private land and all vehicles.

To conclude, this third area of research offers a contribution to knowledge through an assessment of the proposed Seventh Motor Vehicle Directive and an analysis of the consultation document produced by the EU prior to this Directive being formulated (or to amend the current one). Clarity should be provided through this Directive but it will also be necessary to identify any substantive changes proposed and how these affect the current state of breach being committed by the UK in its transposing laws (the RTA88, the Uninsured Drivers' Agreement (UDA) 2017 and the Untraced Drivers' Agreement (UtDA) 2015 (as amended in 2017)). Therefore, the study in this regard will focus on what will the new amendment (the new Directive) mean for third-party victims of road traffic accidents. Will it be source of certainty to have new interpretations that may free the UK from its obligation to modify its national law to come in line with the Directive in this regard? Or will the new proposed Directive confirm the previous interpretations (*Vnuk* et al.) and therefore leave the UK under a continued obligation to remove uncertainty and work in line with the Directive.

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[567] ibid.

7.8.1. The Impact of *Vnuk* on National Motor Insurance Law

The impact of the *Vnuk*[568] judgment has been concerning for the UK, especially after Brexit as to the terms on which the country is going to leave the Community.[569] However, the UK was in breach of the MVID before Brexit and is still obliged to amend the RTA88 and the UDA and UtDA to reflect *Vnuk*[570] at least until the final decision on Brexit is taken. Nonetheless, national law in the current state is still in breach of EU law (Article 3 of the MVID) (i) in regard of the scope of cover (s 145, which covers personal liability of user only and ignores product liability as stated in Article 3) and (ii) in the definition of the road (s 192). Further, the revision of *Vnuk,*[571] if it is to be disapplied, will not make the UK's national law compliant with EU law (look for instance at s 185 RTA88). Therefore, the national law in its current state does not provide the required level of protection as stated by EU law, both before and after the *Vnuk*[572] judgment. The *Vnuk*[573] judgment simply exacerbated the UK's position in this regard. Therefore, the Government needs to urgently broaden its national law to comply with EU law which means that (i) more people need to have an insurance policy with a minimum of third-party cover which in turn means (ii) more victims of motor vehicle accidents would be able to have access to compensation. However, the cost to comply with EU law after *Vnuk*[574] and its broad interpretation may raise real difficulties for the Government to consider it as an option as insurers may refuse to take on the risk insuring many types of those out-of-scope vehicles as well as the fear of fraudulent claims that may increase in

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[568] ibid.

[569] Which was discussed in detail earlier in this chapter.

[570] *Vnuk* (n 11).

[571] ibid.

[572] ibid.

[573] ibid.

[574] ibid.

regard of vehicles operated on private land.[575] Further, newly-in-scope vehicles would be very expensive to have an enforcement mechanism as the one that controls current within-scope vehicles.

Vnuk can be deemed as a very protective case that may have negative impacts on motor insurance law, which may lead some insurers, specifically in the UK, to refuse to insure certain vehicles or to increase premiums significantly. The EU legislature has admitted that the adoption of such a protective approach in terms of compensation as well as exclusion clauses could be problematic for Member States to adopt, which proves the claim that this area of law lacks legal certainty. Further, the EU Commission stated that the *Vnuk*[576] judgment, if to be enforced without clarification to lessen its impact, would have a negative impact on some sorts of vehicle (such as in motorsports) and other vehicles operating on private land such as in factories and farms, and would affect premiums too. The Commission in this regard suggested that a new Directive (or amendments to the current one) become a requirement to address the issue of the existing scope of cover which will ensure the protective purpose of the MVID is maintained, and to take into account other activities that may suffer as a consequence of *Vnuk*.[577]

7.8.2. The Impact of *Vnuk* on Community Principles

The UK's motor insurance provisions lack legal certainty. The issue is due to the existence of contradictory exclusion clauses that cause inconsistency between the UK's motor insurance law (the RTA88 and the MIB's Agreements) and the MVID which, in many cases, undermine the principle

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[575] Which has led to many industries, for example in motor sport, to lobby the Government to secure exemptions against a compulsory insurance requirement.

[576] ibid.

[577] ibid.

of legal certainty. The issue becomes clear when not only lay people fail to predict their rights under this law but lawyers and academics too, which reflects the level of ambiguity that has afflicted the UK's national law. Furthermore, legal certainty can have further negative consequences that can affect not only victims of road traffic accidents but insurance premiums too as uncertainty affects predictability in the market which can lead to price fluctuations and increases (see for instance, *Commission v Greece* [1995]).[578] The element of uncertainty after the *Vnuk* judgment becomes greater in respect to the geographic scope of compulsory motor insurance cover as compensation must be available regardless of where the incident takes place.

The UK's national law (the RTA88 and the MIB Agreements) cannot be considered to have been fully in compliance with the UK's Treaty obligations to implement EU law in such way that acts in accordance with its duty to ensure the principle of legal certainty is met (see in this respect, *Commission v Netherlands* [2001] where the CJEU held that national States shall ensure that the legal system does not breach the concerned Directive).[579] In other words, the UK's breach, in terms of the scope, exists before and after *Vnuk.*[580] The case has just confirmed the breach and widens its scope, which leaves the UK in a precarious position as the issue becomes more complicated. Furthermore, the purpose that the MVID were so strict in permitting EU Member States to impose exclusion clauses is that uncertainty (by having different motor insurance laws) may hinder free movement, which would negatively affect the Single Market as there is no point having free movement without legal protection. As far as disparities exist, free movement would be in jeopardy

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[578] *Commission v Greece* [1995] ECR I-1621.

[579] *Commission v Netherlands* [2001] ECR I-3541. Where EU Member State failed to fulfil its obligations and comply with Directive 93/13/EEC by imposing unfair terms in consumer contracts, which was interpreted as an incomplete transposition of the concerned Directive into national law as required, which was deemed to be undermining the effectiveness of the Directive.

[580] *Vnuk* (n 11).

(unlawful exclusion clauses and the scope of cover are a real threat to free movement), which has led the EU to adopt a more protective approach.

To conclude, there are many instances of breaches that undermine victims' rights of securing compensation as the level of protection required under the MVID is not met, which reflects how defective the UK national law is in implementing the MVID. However, the exclusion clauses that are in breach of the Directive are not all of the same level of significance given that some reduce victims' entitlements while others completely deprive them of compensation.

7.8.3. Reference to *Vnuk* so far

One of the most significant national cases that has referred to *Vnuk* and developed its implications for national law is *Lewis v Tindale* [2019].[581] In this case, the driver, who was uninsured, hit the victim on private land in June 2013. As the driver at fault could not satisfy the payment of compensation that the victim was entitled to the victim sought his compensation through the alternative route operated by the MIB. As the incident took place on a private land, it raised the issue of compliance with the MVID and precisely with the controversial case of *Vnuk*.[582] The UK national law states clearly that for the MIB to be held liable for any liability, the accident must take place on '*a road or other public place*' and require insurance according to the RTA88, which made them deny any responsibility on private land.

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[581] *Lewis v Tindale* (n 278).

[582] *Vnuk* (n 11).

The issue here is that the MIB does not believe that the CJEU judgment in *Vnuk*[583] is correct and they have stated that, previously, on their website soon after the *Vnuk* ruling,[584] which means they will not accept any liability. That will raise another issue of whether the victim can hold the MIB as an emanation of State and therefore hold them responsible for failing to comply with the MVID and allow the victim to bring his claim to the MIB directly. The case was brought before the High Court where there were three issues for the court to answer; a) the liability if it is required to be covered by insurance under Pt VI of the RTA88? b) if not, then the MIB, under the same law, is not liable. But, can it (the MIB) be held liable to satisfy any judgment that the victim may secure under the MVID? and c) if the victim sought to use the MVID directly against the MIB in a national court, would the Directive have 'direct effect' against the MIB?

The High Court held that the '*vehicle use*' does not fall within the scope of cover required under the RTA88 as it happened on private land, not on '*a road or other public place*.' However, the court held that the *'vehicle use*' did fall within the scope of the MVID. Mr Justice Soole stated that Member States such as the UK are obliged to work in line with the MVID, and, in this respect, such obligation is unconditional and sufficiently precise. Therefore, and referring to *Vnuk,*[585] the '*use of a vehicle*' is to be extended to private land. Furthermore, the court held that the MVID has '*direct effect*' to ensure that third-party victims of untraced/uninsured drivers are not left uncompensated, and to work in consistency with EU law. The MIB argued that '*direct effect*' of the Directive, under Article 3, is conditional to provide a system of insurance, which the UK meets through the MIB, and not to compensate victims of such incidents as the article allows according to its wide

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[583] *Vnuk* (n 11).

584 See, for instance, the commentary of Ashton West OBE in his Blog 'Vnuk - the unintended consequences of a farmyard misfortune'. Available at https://www.mib.org.uk/about-mib/chief-executives-blog/vnuk-the-unintended-consequences-of-a-farmyard-misfortune/.

[585] *Vnuk* (n 11).

discretion. Therefore, the Directive cannot have direct effect against them (MIB). Further, *Vnuk*[586] is yet to be implemented by the UK so that national courts can refer to it. Therefore, private land does not fall within the scope of cover requirements. The MIB appealed the decision of the court, but the appeal was dismissed by the Court of Appeal. The Court of Appeal decision was a game-changer that may put an end to the long argument as to whether the MIB can be held as an emanation of the State. Hereafter, the MIB can be called to remedy any shortfalls in the national law, which supports the previous argument in Chapter Three that the MIB is an emanation of State and to be held responsible for State failures to comply with the MVID. The decision may encourage more judgments in this direction, and result in applying sufficient pressure to encourage the government reviewing its approach in relation to the MVID in respect of third-party victims' rights.

7.8.4. The End of the Geographical Limitation

The first time where the House of Lords were to consider s 145(3)(a) of the RTA88 was in *Clarke v General Accident Fire and Life Assurance Corporation plc* [1998].[587] As the accident had taken place in the car park of a supermarket, which is a private land according to the national law, the insurance liability of the insurer as well as the MIB was excluded. However, the Third Directive, at that time, was restricted too (to a '*road traffic accident*'). The extension, however, did not take place up until 2000 (Regulations 2000) where the words '*or other public place*' were added to s 145 of the RTA88. What can be deemed as a great step forwards to facilitate claims made by innocent third-party victims against the MIB is that the UK's High Court regarded the MIB as an emanation of State, which means victims can thereafter bring their claims directly to the MIB where there is a breach to an EU right conferred on individual instead of *Francovich.* In other words, the MVID

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[586] ibid.

[587] *Clarke v General Accident Fire and Life Assurance Corporation plc* [1998] UKHL 36.

would have direct effect against the MIB as it (the MIB) fulfils its duty as a public organisation, which means that the MIB can no longer limit their liability to its Agreement but to bear the State responsibility to meet the Directive's requirements.

7.8.5. Post-*Vnuk* Interpretation by the CJEU

As mentioned before, according to the MVID, Member States are not permitted to restrict the scope of cover in regard of third-party cover for personal injuries and damage based on each States' interest but to have a minimum cover as required under the MVID where a vehicle is subject to 'normal use' as a means of transport - irrespective of the vehicle's characteristics or where it is used and if it is stationary or in motion. However, a new interpretation, unlike *Vnuk*,[588] states that where vehicles are exclusively used for agriculture purposes they are exempted from this wide scope of cover. The emphasis of such interpretation seems to be on the intention that the use of the vehicle as '*normal use*' and '*as a means of transport*.' For instance, in *Andrade v Salvador & ors* [2017][589] and *Torreiro v AIG Europe Ltd* [2017],[590] the CJEU held that the use of a vehicle is not limited to only road use but to cover any use that is consistent with its normal function. Further, in *Rodrigues de Andrade v Salvador & Ors* [2017],[591] the CJEU confirmed the *Vnuk*[592] approach with regard to a tractor operating on private land to fall within the scope of the MVID. However, at the time of accident the function of the tractor in *Andrade* was completely different from the case in *Vnuk*.[593]

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[588] *Vnuk* (n 11).

[589] *Andrade* (n 284).

[590] *Torreiro v AIG Europe Ltd* (2017) ECLI:EU:C:2017:1007.

[591] *Andrade* (n 284).

[592] *Vnuk* (n 11).

[593] ibid.

Here the tractor was being used to run a herbicide sprayer on private land while it (the tractor) was parked. However, due to landslide where the tractor was parked, it caused the tractor to overturn and hit the victim, leaving him with severe injuries. Nevertheless, the issue here is that the tractor at the time of causing injuries to the victim was not functioning as a vehicle but as a machine. The CJEU, in this respect, differentiated between what was the vehicle intended for *'for travel on land*' and its function at the time of causing injuries to the victim. The court concluded that the tractor has a dual function; a) as a vehicle, which falls within the scope of the Directive, and b) as a machine, which is used to do other jobs such as the one in this case (to run a herbicide sprayer). Therefore, as the tractor was not being used '*for travel on land*' but as a machine, and the MVID does not require insurance cover for *'all types of uses*' of a vehicle, then the incident does not fall into the scope of the MVID (no compensation was awarded). The new interpretation of the term '*use*' in *Andrade* seems to be more restrictive in its application in comparison to *Vnuk*.[594] The term, according to the *Andrade* judgment, is to be, restrictively applied to '*vehicular use*.'

7.8.6. The Directive's Scope between *Vnuk* and *Lewis v Tindale*

The impact of *Vnuk* on the UK national law can be summarised as the following; a) *'use of a vehicle*' where there is no restriction that can be imposed by Member States such as the UK's '*road or public place*,' but to cover any place in its territory. However, vehicles that are exclusively used for farm or 'work' as a machine rather than a means of transport may be exempted under the new interpretation following *Vnuk*.[595] The new clarification of the concerned case leaves no room for the MIB or the Government for manoeuvre but to comply with the MVID or to be held in breach of the

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[594] *Vnuk* (n 11).

[595] *ibid*.

Directive. How that will affect other industries such as the motorsport, and whether the UK is going to comply with *Vnuk*[596] will remain to be seen after Brexit. b) the definition of a vehicle under UK law '*intended or adapted for use on roads*' is too narrow to comply with the MVID's requirement '*intended for travel on land*.' The UK's narrow definition means that a vehicle that is not intended or adapted for use on a road or other public place is not required to be covered by insurance under the RTA88, which means the MIB is not liable for such incidents as it is out of its scope. Further, to be '*intended or adapted on roads'* rather 'land' as the MVID requires means more incidents to be excluded from cover, which undermines the purpose of the Directive. c) the UK national law permits insurers to limit the cover to certain users and use, unlike the MVID where '*the normal function of that vehicle*' irrespective of the username of the type of use. However, the MIB in such case can be held liable but the issue the amount of cover and the procedural rules applied by the MIB put victims of such incidents to a disadvantage compared with those who are able to claim directly from insurers. However, in *Lewis v Tindale*,[597] the claimant brought his claim against the MIB as last resort as well as under *Francovich*. The claimant aimed to ensure that if the MIB were not held to be liable, then the government were to bear the cost. Nevertheless, to hold the MIB liable for incidents taking place on private land in such cases means that the MIB is now the direct target of claimants. However, the court held the MIB is liable for compensation, which is a great shift towards making the law, in this respect, more certain. Furthermore, the decision has opened the MIB to claims that take place on private land as the application of compulsory cover on only public land, required under the RTA88, is not true after this judgment but to be extended to private land too. Furthermore, the extension of the geographical scope may not be the end of the story, but the type of use and vehicles may follow as the RTA88 is currently in breach when compared with the MVID's requirement. Hopefully, the Government will take this case seriously and extend the scope

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[596] ibid.

[597] *Lewis v Tindale* (n 278).

of cover in accordance with the MVID as the impact of *Vnuk*[598] becomes clear and of immediate and direct consequence after the decision of *Lewis v Tindale.*[599]

7.8.7. Summary

The MIB and the UK government may have argued that the decision of *Vnuk*[600] does not require amendment to the RTA88. However, the UK's courts, under the *Marleasing* principle, are obliged to interpret national law in line with the MVID accordingly. In doing so, to, for instance, apply the term '*vehicular use*' in *Andrarde*[601] may make the need for amendments unnecessary. However, as national courts may find it hard to twist the RTA88 wording of '*use on a road or public place*' as the law expressly restricts the scope of cover to earlier mentioned situations, UK courts would not be able to comply with *Vnuk*[602] requirement through the *Marleasing* principle. In other words, the exclusion on private land in respect of a '*vehicle use*' is unambiguous so that the national courts may have the chance for consistent interpretation. Therefore, the only option that may be left for victims of such incidents is to bring their claims against the MIB after the new trend of the UK Judiciary. If not, then, against the government (*Francovich* action) for its failure to properly implement the MVID.

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[598] *Vnuk* (n 11).

[599] *Lewis v Tindale* (n 278).

[600] *Vnuk* (n 11).

[601] *Andrade* (n 284).

[602] *Vnuk* (n 11).

7.9. Reasons for the Reviews

The unprecedented ruling of the CJEU in *Vnuk*[603] and its consequences for motor insurance led the European Commission on 8 June 2016 to announce that the sixth MVID was to be reviewed, mainly to assess the impact of it on motor insurance, which may lead to a new Directive (a Seventh Directive). The announcement was due to a pressure of some EU countries such as France and the UK that there were some misunderstanding of the *Vnuk*[604] judgment and whether such an interpretation can be applied. It is believed that these countries are currently in breach of EU law in this regard (which is the case of the UK), which has led them to object and require a clarification of the case.

Both of which, the Roadmap and Refit reviews, have been recently undertaken to determine whether the MVID is fit for purpose. In this respect, the MVID was reassessed by the EU Commission to find out what can be done to ensure efficiency and effectiveness of the Directive, especially after the CJEU ruling in *Vnuk*.[605] The Commission concluded this assessment claiming that the MVID is fit for purpose. However, the Commission believed that some areas required amendment to ensure protection for third-party victims of road traffic accidents. Back to *Vnuk*[606] and according to the Commission, there are four option for *Vnuk*[607] as the following; a) do nothing. In other words, leave the *Vnuk* interpretation untouched, which means Member States such as the UK need to amend national laws to bring them in line with the MVID or to face *Francovich* claims;

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[603] *Vnuk* (n 11).

[604] ibid.

[605] ibid.

[606] ibid.

[607] ibid.

b) limit the scope to '*in traffic*' vehicles that are used for transport where the public has access to; c) establish a guarantee scheme, where Members States are required to establish a scheme that can meet judgments of *Vnuk*[608] that do not fall in the scope of cover required under the MVID; or d) to exclude certain types of vehicle from the MVID's requirement for compulsory cover.

In this respect (*Vnuk*),[609] the EU seems not interested in changing the meaning of the MVID, but to leave it as it stands in its current form. However, some amendments were needed to confirm the application of the concerned case and others. National States, for instance, in this case need to transpose the Directive accordingly. The UK, in this respect, does not seem to succeed to revoke or narrow the application of *Vnuk*[610] and yet to see how the UK is going to comply with the wide scope of the MVID.

7.10. What has been Suggested?

The main area of concern to be considered was the scope of the MVID especially after *Vnuk*[611] judgment in 2014. The consultation document was of great importance to the UK as such scope is deemed to be impossible to comply with and needs further clarification. The second issue was insurers' insolvency when third-party victims are involved as that may leave victims of such case uncompensated. However, it is true that there is a compensatory body in each Member State to meet unsatisfied claims, it is, nevertheless, out of the bodies' scope if the insurer of the liable party became insolvent. In other words, victims of motor vehicles accidents where insurers become

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[608] ibid.

[609] ibid.

[610] ibid.

[611] ibid.

insolvent before paying off claims brought against its policyholders, would be left uncompensated if the national State of the concerned insurers has no protection scheme in place for such claims.

Under the MVID,[612] Member States are obliged to *'take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance*.' As the Directive leaves it to Member States to meet its obligation the way each Member State wishes, it is, as well, States' responsibilities to reduce the risk of uninsured and untraced drivers. However, the MVID[613] prohibits Member States to carry border checks on vehicles based in other Member States as such checks could be amount to hinder one of the most important principle of the Community (free movement). However, the MVID does not prohibit checks that can be carried without stopping vehicles on the border such as using technology to recognise the vehicles' number plate for verification. The checks, nevertheless, shall not be discriminatory.

Finally, under the MVID,[614] Member States must ensure that the minimum level of protection for personal injuries and damages are provided across the Community. However, new Member States are exempted from such requirement to have the same level of compensation due to what is called transitional period. Nevertheless, the transitional period that permits some country not to comply with the MVID has expired but the permitted States yet to comply with the Directive. The UK, however, is not one of these exempted countries.

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[612] Article 3.

[613] Article 4.

[614] Article 9.

7.11. The Commission's Proposal

Following the 2017 REFIT consultation, the EU, in May 2018, published a proposal suggesting that some changes to the MVID are needed in order to protect third-party victims of road traffic accidents.

There were four areas of concern, one of which was the scope of cover required under the MVID. According to the proposal, the compulsory cover is to apply to only vehicles '*in traffic*' or, in other words, '*in circulation*.' However, although such suggestions may narrow the wide scope of cover required after *Vnuk*[615] where private land, according to the proposal, shall be restricted to where the public has access to, many such as the DWF stated that the financial and administrative cost is of their main concern as to the risk which is disproportionate.[616] Nevertheless, the proposal may/may not be approved by the European Parliament and the Council as further examination is required before being (the proposal) codified. That means the *Vnuk*[617] interpretation is to continue as the only valid interpretation for Member States in respect of the scope of cover required under the MVID, and any Member State breaching the scope as interpreted by *Vnuk*[618] will be held in violation of the EU Directive. However, the earlier suggestion to exempt vehicles due to its only use in '*closed areas*' not '*in traffic'* is conditional that such vehicles will not be used sometimes in area where the public has access to. Further, if a vehicle requires a cover due to its use in traffic, it would remain liable for any damages or injuries that the concerning vehicle may cause in a closed area. Nonetheless, the requirement of having a vehicle insured/liable due to its use, sometimes, 'in traffic'

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[615] *Vnuk* (n 11).

[616] The UK government shares the same concerns.

[617] *Vnuk* (n 11).

[618] ibid.

is vague. Some clarification is needed as to how a vehicle that operates in a closed area can be, sometimes, used 'in traffic?' (See for example, *Lewington v MIB* [2017]).[619] Furthermore, insurers may restrict their liability to only places (public and private land where the public has access to) where the vehicle requires insurance cover '*in traffic or circulation*' according to the Directive. Therefore, the EU may need to use new terminology, such as '*in traffic*' carefully, and provide enough clarification as '*in traffic*,' which means 'where the public has access to,' may be interpreted by compensatory bodies such as the MIB as '*road or other public place*,' and therefore, claim that they are working into line with the Directive while in fact not, which may result in third-party victims being left uncompensated.

In respect of the motorsport's exclusion, one may justify that such type of vehicles only operates in controlled areas. Furthermore, there is some sort of insurance applied to it, which can be deemed to fill in the gap of cover. However, new types of vehicles such as Segways and electric bikes may not require cover as the one required for normal vehicle as such a requirement is not proportionate to its potential risk (such vehicles will not, for instance, kill, cause severe injuries or damages to properties). Although the draft is wider in its geographical scope of cover than the UK national law, the scope however, is considerably narrower than the initial interpretation of *Vnuk*.[620]

Back to the UK, the Government cannot deny that 'by law' the judgment of *Vnuk*[621] must be taken into account. However, the doubt about the scope of cover required according to *Vnuk*[622] is too wide to be implemented accordingly (in respect of enforcement and potential fraud), and it could have a

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619 *Lewington v MIB* [2017] EWHC 2848.

620 *Vnuk* (n 11).

621 ibid.

622 ibid.

financial impact on premiums too, which may lead to some drivers using their vehicle without legal cover as such a requirement is financially difficult to meet. In this regard, a question was directed to the Secretary of State for Transport on whether to implement *Vnuk*[623] in the UK, which was answered by the MP Andrew Jones stating that *'we oppose any measure that imposes unreasonable costs on British motorists, home owners and businesses.'* Although the reply may not be the official one, it, however, reflects the overall view of the Government to consider *Vnuk*[624] in its original interpretation as an option for implementation. However, the Government as well as the MIB may prefer an '*in traffic*' option, at least for now, as it is the closest available option to UK national law. In either way, the proposal, if approved, would work out favourably for the UK as it provides a practical solution to the controversial judgment of *Vnuk*.[625] At least for the time being as the MVID's must be met or the UK will be held liable in breach of EU Directive under *Francovich* action.

7.11.1. The Proposed Amendments on the Way for Codification

The Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 is to be amended to ensure that civil liability in respect of motor vehicles use is legally enforceable. The Commission assessed the efficiency and effectiveness of the MVID and conclude that apart of four areas to be amended, the MVID fit for purpose. The four areas are as the following;

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[623] ibid.

[624] ibid.

[625] ibid.

a) The Commission amended the MVID by introducing in Article 1 the definition of '*use of a vehicle*' in order to incorporate the CJEU's judgment of *Vnuk*[626] and others as mentioned earlier. The Commission inserted 1(a) to Article 1 to clarify the contravention interpretation of the term '*a use of a vehicle'* used under the MVID to remove misconceptions by stating that

> *"use of a vehicle" means any use of such vehicle, intended normally to serve as a means of transport, that is consistent with the normal function of that vehicle, irrespective of the vehicle's characteristics and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion.*

The clarification leaves no room for national States for manoeuvre but to take it into account and bring its national law into line with the definition or otherwise the State failing to do so will be held in breach of EU Directive. This, however, may prove some difficulties for application for some Member States that the Commission is not aware of as to require a compulsory cover for any vehicle anywhere (the scope, from some States' point of view, still wide).

b) Article 4 of the MVID is to be amended so that Member States can carry out some sort of insurance checks on its borders, which was not permitted before as such checks used to be deemed to undermine free movement of people and vehicles. The new amendment, however, aims to reduce uninsured driver claims across the EU. Such permission is conditional that the checks must not discriminate against others and is proportionate. The Commission, nevertheless, failed to come with any measures that ensure such permission will not be misused by Member States. Furthermore, the checks at borders shall not require stopping vehicles and to be in accordance to Regulation 2016/679. Notably, the check shall not be carried out for solely insurance verification but to be part

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[626] ibid.

of a control. Member States may use number plate recognition technology in order to prevent uninsured driving relating to cross-border traffic.

c) The EU is to amend Article 9(1) to ensure that a minimum amount of cover is not only available, but to be comparable too in all Member States. Further, under the same Article, the EU is to have the power to update the comparable minimum amount of cover every 5 years to keep the minimum cover in line with inflation. Such requirement may become an issue for new country to meet especially the majority of which are poor countries comparing to others in the Community such as the UK and Germany.

d) Third-party victims of road traffic accidents are not protected in cases of insolvency, winding up or where there is no cooperation of an insurer. Therefore, Article 10(a) is to require Member States to appoint or set up a body that can meet any liability towards victims caused by a vehicle operated according to the Directive definition. In other words, compensation shall be always available for victims regardless of the insurer position or where the victim's residence. However, victims of road traffic accidents may not have the right to claim their compensation from the appointed body, if they have an exciting claim made directly to the liable insurers. If no claims against any insurer made, then victims can bring their claims against the appointed body and the body shall give response within two months of the date of the claim. And

e) to ensure that claims history is not treated by insurers discriminatorily based, for instance, on nationality of where the policyholder residence, but to be taken into account by any insurer anywhere in the Community regardless.

The proposed amendments were approved by the European Parliament on 13 of February 2019. Nevertheless, the new amendments will now go back to the IMCO[627] for further negotiation called (inter-institutional negotiations) before codification.

7.12. Conclusion

The *Vnuk* judgment simply means that the limitations of the RTA 1988 in its current scope needs to be reviewed in order to bring it into line with EU law. *Vnuk*[628] leaves ss 143 and 185 of RTA 1988 in breach of the MVID. The former provision in regards to 'road or other public place' where the RTA88[629] states that drivers are obliged to have valid insurance on '*road or other public place*' and the cover is restricted to the policyholder '*by that person such a policy of insurance*' which limit the scope of the cover to roads and public places as well as to the user who is to be covered by the policy. The latter in regard of '*intended or adapted for use on roads*.' For the EU to decide, after a few years of the *Vnuk*[630] judgment, to propose clarification of the case in order to codify its decision means that during the period of time prior to codification victims were uncertain about their right under the MVID. In other words, prior codification, compensatory bodies, such as the MIB in the UK, were in a situation where they are required to meet claims take place on a private land with no requirement to have in place insurance cover such land. However, the implication of *Vnuk* may not last for longer as Brexit is getting closer.

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627 The Internal Market Consumer Protection Committee (IMCO) of the European Parliament.

628 *Vnuk* (n 11).

629 Section 143(1)(a).

630 *Vnuk* (n 11).

Finally and in the absence of revoking the national law (see Chapter 6), the UK needs to amend the provisions and procedural clauses to bring it into line with the general objectives the MVID to provide the right protection for third-party victims of road traffic accidents and facilitate free movement of people and vehicles in the Community without border checks hinderance or unlawful exclusion clauses. If that is achieved accordingly, that will build on confidence in the Single Market for this area of law and ensure legal certainty at the same time. Motor vehicle insurance is of a great influence on other financial services in the Community such as the non-life insurance business. The UK needs to remove any direct or indirect obstacles that may undermine free movement of people and vehicles and to guarantee comparable treatment in the Community regardless of where accidents take place. The new amendments, if codified, will make the law in this area more certain, and Member States would have no much room to exploit the wide discretion contained in the previous MVIDs in order to escape liabilities towards third-party victims of road traffic accidents.

Chapter 8**: The** European Union (Withdrawal Agreement) Act **and** the Future of Motor Vehicle Insurance Law

8.1. Introduction

It is important to note that this section of the thesis was prepared in the event of the COVID 19 outbreak. Given the political and economic implications of the virus, it is difficult to determine whether the UK Government will continue its exit strategy from the EU and leave on 31 December 2020, or will seek to extend the transition period (as permitted prior to July 2020).

The UK formally left the EU on 31 January 2020, and immediately entered an 11-month transition period. During the transition, the UK remains aligned to the EU and therefore, in practical terms, almost everything in respect of the laws and regulation as had been experienced prior to the formal withdrawal becoming effective remains the same, subject to some minor changes. This means EU law will continue to have supremacy over national law, and the Court of Justice of the European Union (CJEU) will continue to exercise its jurisdiction over matters to do with EU law during this period. However, it has certainly not been a straightforward process in reaching this position given that the European Union (Withdrawal Agreement) Act 2020 (hereafter the Withdrawal Act) has been through a different stages until its final Royal Assent in 2020.[631] The Act is of a great importance and has huge implications for people's rights conferred on them under EU law. Significantly for this thesis is the rights of third-party victims of uninsured and untraced drivers. The Act provides Ministers with not just the power to (largely) pick and choose whichever residual EU laws they wish to keep or to repeal, but also it enables the judiciary with powers to select the interpretation of the law, given the removal of the jurisdiction of the CJEU and its jurisprudence,

[631] The Withdrawal Act was given Royal Assent on 23 January 2020.

which was not possible under the previous incarnation of the Act. This means, based on previous experience, that third-party victims will have no better protection and indeed probably less protection after the amendments to the previous Act. The new Act is a revised version of the previous Act introduced during Teresa May's premiership,[632] which failed to pass through Parliament due to that administration's small majority[633] following its agreement with the Democratic Unionist Party (DUP). The new changes are mostly to do with the Irish border after Brexit,[634] which is considered as the biggest single concession that the new Government has made (which was not possible under the previous government)[635] given such a policy transgresses the Good Friday Agreement. However, the other changes would have a great impact on third-party victims' rights of uninsured and untraced drivers where neither EU law nor CJEU judgments are to be considered as a legal source that the judiciary may refer to.

In this part of the study, the author will shed light on the implications of the Act, and whether third-party victims of uninsured and uninsured drivers will keep, lose or have greater protection after some expected changes to national motor insurance law. It further discusses the government's options following its final withdrawal from the EU. Therefore, to understand whether third-party victims would be able to enforce their rights in the UK derived from EU law, the study of the Withdrawal Act is inevitable as to what rights the Act may protect and what to ignore.

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[632] It was agreed in November 2018.

[633] The UK Parliament rejected the Withdrawal Agreement agreed between EU27 negotiators and former Prime Minister Theresa May in November 2018 on three occasions.

[634] Northern Ireland will be set apart from the rest of the UK when it comes to EU rules. However, the deal gives the Irish Assembly a vote (four years after the end of the transition period) on any new arrangements. If the Assembly votes against the new arrangements, they would stop applying two years later, during which time the "joint committee" would make recommendations to the UK and EU on what to do about this. No agreement during this two-year period, some form of hard border could re-emerge in Ireland.

[635] The previous government could not pass the 2018 Agreement due to the opposition of the DUP.

8.2. What is it for and What Changed between the 2018 and 2020 Acts?

The Withdrawal Act sets out the terms of the UK's withdrawal from the EU. The primary aim of the Act is to confirm the repeal the European Community Act 1972.[636] However, technically, whilst the repeal took place on the UK's exit day, the UK's status as a Member State (with the majority of the same rights and responsibilities remaining in place) continues until the conclusion of the transition period where both sides either agree a new trade deal or the period of time agreed is over, which means EU legislation will continue during the transition period up until the end of it.[637]

The difference between the previous agreement and this latest agreement includes the Irish border and whether the UK should entirely leave the customs union once the transition period is over. In respect of Irish border, that part of the UK will follow EU rules after the end of the transition period for a few years until another solution is agreed on how to avoid hard borders between the two constituent parts of Ireland. In respect of the legal regulations, significantly, the previous requirement for Parliament to approve the Government's statement of objectives relating to the future relationship between the UK and the EU has been removed; Parliament's approval of any extension to the transitional period has been removed and lower courts will be allowed to depart from the jurisprudence of the CJEU, a power previously reserved for the Supreme Court and the Scottish High Court of Judiciary.

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[636] The European community Act 1972 is the Act which took the UK into the EU.

[637] Clause (1), where the Bill amended the Withdrawal Act 2018 to ensure that the effect of the European Communities Act 1972 continues despite its repeal on exit day, until the end of the transition period.

8.3. The Implications of the Act

What one can say for sure is that the Act will profoundly impact all the aspects of the legal system in the UK as major change is inevitable. However, the real impact will be only seen after the end of the transition period if no a trade deal is agreed as no reference to EU law would mean that no remedies can be sought due to breaches of compliance with EU as a superior law. This means, inter alia, no *Francovich* claims, no direct effect of the MVID, no further reference to the CJEU,[638] and no application of the Seventh MVID when enacted or future MVIDs (a major expansion to the rights and protections for third-party victims in the UK). This means no challenges as to the validation of an Act and all the EU fundamental principles are no longer applicable in the UK. In respect of motor vehicle insurance law, as the Government has confirmed that there is no intention for it to follow any dynamic alignment with EU law following a 'no deal' Brexit, the new trend for the UK judiciary will be to enter a phase of uncertainty, with old EU laws, EU Law-inspired national laws, regulations and administrative procedures, and existing interpretations of national laws now being subject to a new form of interpretation. Further, a natural consequence will be for lower, non-precedent forming courts to arrive at decisions which will be at odds with other courts and this will continue until definitive guidance is issued either at statutory or superior court levels.

Specifically in respect of motor vehicles insurance law, the implications of the Act can be identified as the following;

a) No redress through State liability.[639] Member Stares are obliged to take into account EU law when legislating as compliance with EU law is not an option but a requirement, and any failure (partially

[638] Clause 26(1).

[639] Schedule 1, paragraph 4 of the Act provides that "*there is no right in domestic law on or after exit day to damages in accordance with the rule in Francovich*."

or fully) would be challenged under a '*Francovich* action.'[640] It will be remembered, as demonstrated throughout this thesis, that motor vehicle insurance has been one of the very few areas of law where State liability has been an effective means of ensuring third-party victims denied their rights at EU law have been able to secure redress. However, the removal of *Francovich* does not affect claims that have already been initiated before national courts before exit day.[641] Nevertheless, it is not clear whether a claim that can be sought under *Francovich* before such removal but due to some reasons was not brought up until the exit day to be allowed.[642]

b) No direct effect

Some EU legislation have direct effect, emphasised most recently in *MIB v Lewis*[643] where articles 3 and 10 MVID were held to have direct effect, and thus can be relied upon directly in national courts by citizens in the event of non-transposition by the Member State. This will no longer be applicable on or after exit day. There is no guarantee that national legislation passed for the purpose of compliance with the Directives will continue, especially in respect of third-party victims' right of recovery against uninsured and untraced drivers as the MIB and the Government have failed to show any interest in fully and effectively transposing the MVID or adhering to the jurisprudence of the CJEU. Thus, as the UK has failed, substantially at least, to follow EU motor vehicle insurance law when it was obligatory it is unlikely to do so when the UK is free of any obligation unless a new deal provides otherwise and the Government has a change of heart.

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[640] See Chapters 5 and 6 for discussion.

[641] Schedule 8, paragraph 39(1).

[642] Schedule 8, paragraph 39(3)), (2) proceedings are "begun within the period of two years beginning with exit day so far as the proceedings relate to anything which occurred before exit day" (Schedule 8, paragraph 39(7)).

[643] *MIB v Lewis* (n 6).

c) No validity challenges

In respect of validity of national law and its compliance with the MVID, claims of non-compliance may take effect before the exit day or otherwise such claims will fail and no longer be permitted. The UK under the Withdrawal Act does not recognise past CJEU decisions as binding at any level. The previous Act did consider the CJEU as binding on UK courts apart from the Supreme and High Courts if the case was related to an incorporated law (an EU law that was transposed to national law).

Finally, it is not clear whether the power delegated to Ministers when converting EU law into national requires any specific primary legislation, as such amendments may need approval.[644] In other words, the new laws that are derived from EU law can be transported, or altered by ministers and not subject to any kind of approval by Parliament,[645] and Ministers retain the power to do so in the future. It is not clear how the implications of powers, rights, liabilities, obligations, restrictions, and procedures recognised by virtue of section 2(1) ECA 1972 will have effect as to be recognised in the UK as part of the national law. Furthermore, no rights arise out of an EU Directive that were not already implemented or incorporated into national law. In other words, any non- or incorrectly implemented Directives will have little chance to be considered as part of future motor vehicle insurance law.

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[644] Clauses 3 and 4.

[645] Clause 30, subject to the approval of the House of Commons. However, the clause had been removed from the 2019 Bill.

8.4. The Post-Brexit, EU Law Position

As mentioned earlier, the post-Brexit transition period began on 31 January 2020 and will end on 31 December 2020. Within this time frame the UK will still follow EU laws as usual with no changes to free movement or access to the Single Market and Customs Union. By the end of this period of time the Government has to come with new rules and regulations to regulate the relationship it has with the EU. Were this not the case and the UK had decided not to attempt to develop a new trade deal with the EU, there would have been no requirement for the transition period and rather the UK would simply have chosen to 'crash out' of the EU with no further membership, and indeed be one of the very few countries in the world with no effective trade deal with any other trading block (the World Trade Organisation being a default trading position rather than a deliberate choice for its members).

The aim of the Withdrawal Act is to ensure that the legal system will operate smoothly from the 1 January 2021 where all applicable EU law becomes part of national law unless and until the UK decides otherwise at a later stage through, for instance, the enactment of new primary legislation, secondary legislation and so on. However, under s 25 of the new Act, such effect will not take place at the moment but will be left until the end of the transition period. Unlike the previous incarnations of the Withdrawal Act, which limited the power given to the UK judiciary when interpreting CJEU case law, the new Act does provide the judiciary with a wide discretion to depart from incorporated CJEU case law. Under s 26 of the new Act,[646] the Government may instruct UK courts not to consider incorporated EU case law to be binding on them even though such cases have been

[646] A new subsection was added to Clause 26 as introduced in December, which allows UK Ministers, by regulations, to specify the circumstances in which lower courts could depart from retained EU case law after the implementation period.

considered by UK courts or any UK cases that were decided based on the CJEU judgments.[647] The level of intervention in how EU law and case law will be interpreted is of a great concern as the Government may limit the judiciaries power to function properly without its guidance, a position which may be controversial as it appears to undermine the separation of powers principle enshrined in the constitution.

To conclude, the legal consequences of leaving EU under such instructions taken by the government will be severe on third-party victims of uninsured and uninsured drivers as national law is likely to provide less protection in the absence of reference to the Directive.

8.5. Any Chance for an Extension?

The original Withdrawal Bill allowed for the UK's request of an extension to the transition period for up to two years if other issues such as its budget contribution was agreed between the Government and EU. However, the new Government elected in December 2019 passed law that prohibits such an extension unless the request is made before July 2020. Even though this remains the legal position, there remains a chance for an extension beyond this point.[648] The issue of a hard border between Northern Ireland and the Republic may pose difficulties for motorists as they will be subject to different treatment from the other parts of the UK.[649] In respect of an extension to the transition period, the EU recently sent signals that suggest it would support the option of an extension. The IMF chief has also suggested that the UK and EU should consider an extension as an

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[647] Section 27 of the new Act amends the government's power to adopt secondary legislation to address 'deficiencies in EU law' related to withdrawal from the EU to cover measures adopted during the transition period.

[648] Clause 33, the Bill as introduced in December 2019 prohibits any UK Minister from agreeing to an extension of the implementation period.

[649] Ibid. page 1.

inevitable choice to avoid uncertainty as to strike a comprehensive trade deal on time as planned is very unlikely.[650]

To conclude, the time allocated during the transition period may be only enough for a basic trade deal, even before the global disruption caused by the COVID outbreak. Currently many important issues remain unresolved, which may increase the chance for an extension to avoid undesirable consequences to both sides or the UK simply determining that a 'hard Brexit' should be pursued. The option for the Government may be to extend the transition period to allow more time for preparation to reduce disruption as much as possible and to avoid the inevitable negative effects to the economy as businesses need more time too and will welcome such a move.[651]

8.6. Any Progress Been Made So Far?

The first round of substantive talks between the UK and the EU started on 2 March 2020 and lasted until the 5th of the same month. The second and third rounds were postponed due to the pandemic as many EU countries were in lockdown. On 16 April 2020 both sides agreed to hold the following planned talks by video conference until the lockdown is over. Therefore, one can claim the progress expected (if there is any) is limited. Furthermore, negotiating such a new relationship through video can be challenging to both sides, especially where the time for negotiators is limited (to strike a comprehensive deal within 11 months). Therefore, more time (an extension) may provide some certainty as to allow thorough negotiations between the parties and will reduce the risk of another shock to the economy due to Covid-19. The government may need to give priority to deal with the

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[650] Last accessed 24/04/2020, Available at: https://www.bbc.co.uk/news/business-52304821.

[651] See for example the Office for Budget Responsibility at paragraph 2.14) Office for Budget Responsibility, Economic and fiscal outlook. Presented to Parliament by the Chief Secretary to the Treasury by Command of Her Majesty, March 2020.

pandemic and delay Brexit in spite of the fact that such an extension may cause the Government some negative political reaction given the significance of its Brexit stance in the December 2019 election victory.

8.7. Future UK/EU relationship, Free Trade Agreement

The future relationship between the UK and EU is addressed in their political declaration. Both sides are to work towards certain goals such as the establishing of a Free Trade Agreement (FTA) which was planned to start in June 2020. The outbreak of COVID has delayed this timetable. Initially, both sides agreed to keep the same standards on competition, climate change, the environment and social and employment standards. However, the reference to a 'level playing field' is now removed under the new Act. To some extent, the UK is already aligned to EU rules which should make it easier for it to strike a new trade deal. However, the issue here is that the Government does not seem to be interested in the notion that the UK cannot in the future depart from EU rules as such would prevent it from striking new trade deals worldwide. This position makes the negotiations more difficult as alignment is inevitable for a comprehensive deal and as the Government, under the new Act, removed the UK's promises to have a close alignment to the EU's regulatory system after Brexit, along with specifically denying the jurisdiction of the CJEU, the parties seem diametrically opposed on a future relationship.

In this respect, it is not clear how far the UK is allowed to depart from EU regulations even if both sides succeeded in striking a free trade deal as such a deal will not eliminate all checks between the two sides. The EU's main concern, under such a scenario, is that its food standards can be undermined as food with a lower standard may find its way to the Single Market through the UK if it has access to the Market without compliance on product regulations. Therefore, it is not clear how

much the UK will or is permitted to depart from EU rules as the EU restrictions on British goods will depend on rules alignment.

Finally, failure to strike the right deal on time means that the two parties would trade on the World Trade Organisation's terms where free movement would vanish and border checks become inevitable. The IMF has suggested the UK and the EU should not '*add to uncertainty*' following COVID by refusing to extend the period to negotiate a post-Brexit trade deal. The Government is yet to comment on the European signal for an extension.

8.8. Possible Scenarios after the Transition Period

There are two possible scenarios at the end of the transition period that may take place:

8.8.1. A *Trade Deal*

If the UK succeeded in striking a comprehensive deal with the EU, then such deal can come into force at the end of the transition period in the guise of a new relationship with EU. However, there are different signals as to this possibility although in reality there is currently little likelihood of the conclusion of a comprehensive trade deal, especially in respect of the outbreak of COVID.

8.8.2. No Trade Deal

The second possible scenario is where the UK and EU fail to strike a deal on time by the end of 31 December 2020. In such a case the UK will leave the EU with no deal. Based on Government policy, the only way an extension will be sought is if the impact of the pandemic alters its position. However, the EU needs to agree as well to extend the transition period.

8.9. The Impact of COVID-19

There is no doubt that the impact of COVID on the economy is adding extra pressure on the Government to reconsider its approach in respect of its relationship with the EU, at least on the timetable set out by the Government to deliver Brexit. However, at the time of writing there is no signal from the Government to support such a claim that it will seek an extension. Nevertheless, the Government's decision to rule out any sort of extension to the transition period could be read as a political signal to ensure supporters as well as 'remainers' that a soft-Brexit is not a choice. It might also be viewed that the Government intends to proceed with a hard-Brexit in light of the COVID outbreak to hide the negative economic consequences that a no-deal Brexit would bring. Given the easing of the restrictions on travel and on commerce from May 2020 across the EU, it may be possible for Brexit negotiations to continue with an increased sense of vigour to aid the economies and financial institutions across the trading block.

8.10. Conclusion

The UK has left the EU. However, significant changes will only take place when the transition period ends where it becomes clear what sort of relationship the UK will have with the EU. A no

deal scenario or a rushed deal may leave some of the most significant issues unresolved. The time allocated for the conclusion of a negotiated comprehensive deal is short and extremely challenging. This was before the outbreak of the pandemic. Any unplanned strategy to leave without a trade deal will pose a significant risk to the economy which is already suffering due to the lockdown to confront the pandemic. According to the fiscal watchdog, lockdown may cause the economy to shrink for up to %35, and Brexit may add an extra shock to the economy of up to %5.

Returning to motor vehicle insurance law, the MVIDs position will either continue, which is highly unlikely under the Conservative Government, to be incorporated into national law or to be restricted to certain limits that match the current national law position. Incorporation means that the challenge will stay at a national level as to protect third-party victims' rights with no reference either to the Directives nor to the related CJEU case law, as the hierarchy of provision to give effect to EU as superior law, which exists while the UK is a Member of the union do not exist. However, it is too early to know the real consequences that will follow at the end of the transitional period. Drivers who wish to drive in EU countries may need to obtain a Green Card which ensures that UK-drivers have third-party cover, or to have an International Driving Permit (IDP). However, in either way, disruption to movement will have a severe impact on the economy as long queues are expected on the borders between the UK and EU due to certain checks that will be required to be conducted if no deal is reached. Nevertheless, what happens next will depend on the negotiations between the UK and EU on their future relationship. Third-party victims' claims after the end of the transition period, if no future deal states otherwise, will have to be brought in the country where the accident happened and to use the local language, local laws and these may be considered by many as inconveniences and result in extra costs in order to secure compensation. The scope of cover and level of compensation provided to third-parties will be diminished too. The Government and the MIB have not transposed the MVID with the intent of parties wishing to fully protect vulnerable

victims of uninsured or untraced drivers. In the absence of EU law at least providing guidance and an expectation on the protection that should be afforded such individuals, the future looks increasingly bleak for future legislative and administrative arrangements unencumbered by scrutiny and enforcement at a supranational level.

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